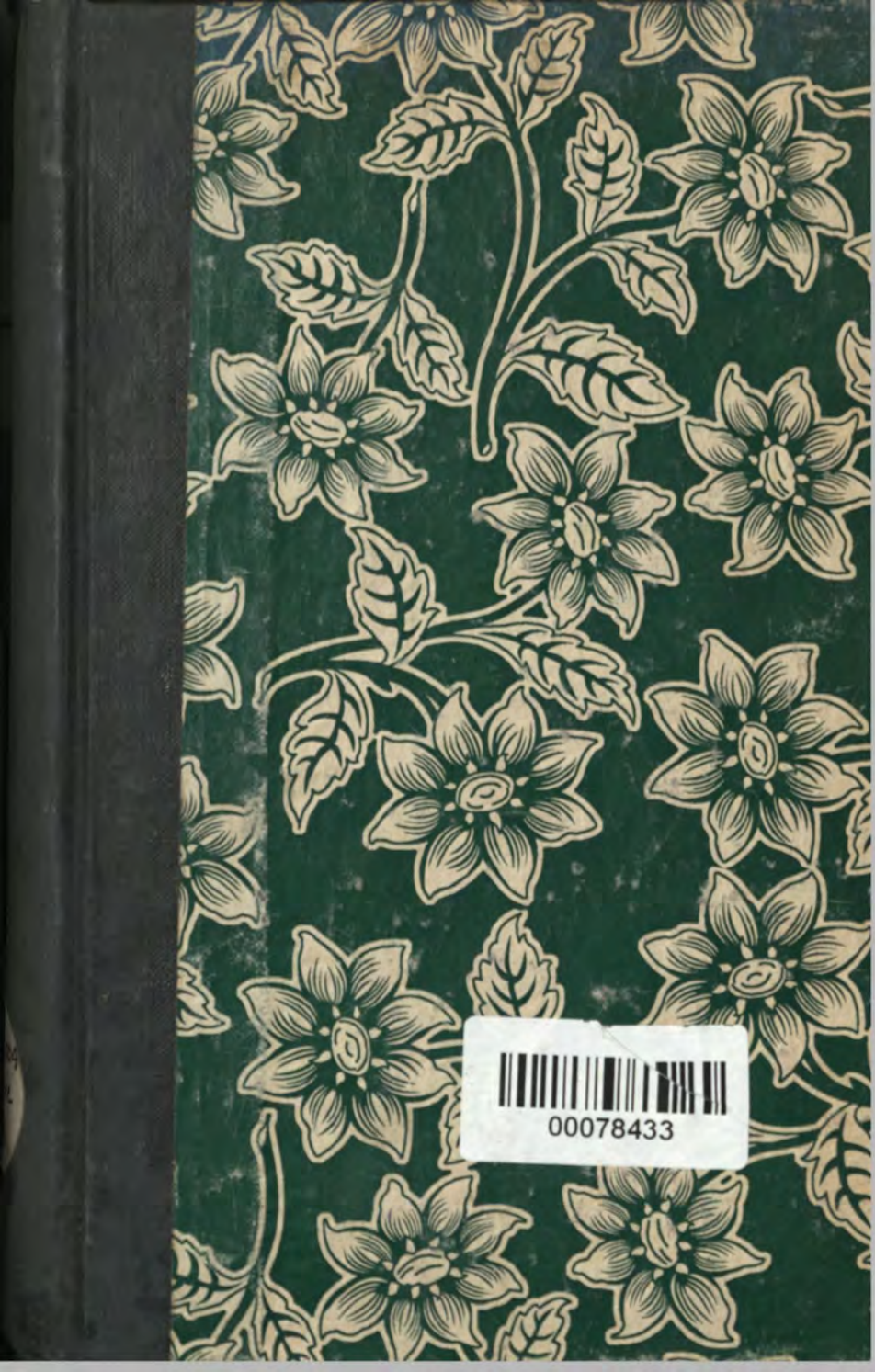
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TREATISE

OF

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WITH

THE ADDITION OF

MARGINAL REFERENCES AND NOTES,

By JOHN FONBLANQUE, Esq.

BARRISTER AT LAW.

FIFTH EDITION,

CORRECTED; WITH CONSIDERABLE ADDITIONS.

VOL. II.

N. a. 6

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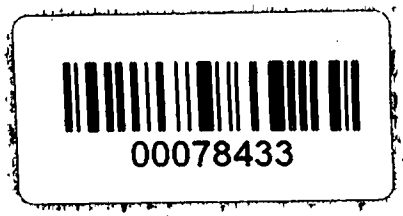

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A

TREATISE OF EQUITY.

BOOK THE SECOND.

OF USES AND TRUSTS.

CHAP. I.

Their Nature.

SECTION I.

We will now proceed to some of the particular kinds of Agreements which occur most usually in Chancery. And, 1st, Of a depositum or trust, to which this Court owes its original (*a*), and which, if well

(*a*) The trust here intended, as it was the origin so it is also the peculiar object of equitable jurisdiction. There are, however, other trusts, which are, and always have been, cognizable in courts of law, as deposits, and all manner of bailments, and especially

considered, will still be found to make the principal business here; for whoever has

that implied trust to account for money received to another's use. See 3 Bla. Com. 432, and Sir Wm. Jones's admirable Essay on the Law of Bailments. With respect to those trusts which are exclusively cognizable in our courts of equity, they are in their nature very similar to the fidei commissa of the civil law; and indeed the invention seems to have been borrowed from them; and as the jurisdiction of the prætor was created for the purpose of protecting property fidei commissum, so were courts of equity erected, or at least their jurisdiction extended, for the purpose of protecting and enforcing the execution of trusts. The history of the prætorian institution is thus described by Justinian: "Sciendum est omnia fidei commissa, primis temporibus, infirma fuisse; quia nemo invitus cogebatur præstare id de quo rogatus erat: Quibus enim non poterant hæreditatem vel legata relinquere, si relinquebant, fidei committebant eorum, qui capere ex testamento poterant, hæreditatem, et ideo fidei commissa appellata sunt: quia nullo vinculo juris, sed tantum pudore eorum qui rogabantur, continebantur. Postea divus Augustus primus semel iterumque, gratia personarum motus, vel quia per ipsius salutem rogatus quis diceretur, aut ob insignem quorundam perfidiam, jussit consulibus auctoritatem suam interponere: quod quia justum videbatur et populare erat, paulatim conversum est in assiduam jurisdictionem: tantusque eorum favor factus est, ut paulatim etiam prætor proprius crearetur, qui de fidei commissis jus diceret, quem fidei commissarium appellabant. 2 Inst. lib. 2. ti. 23. Duplex olim usus fidei commissorum fuit unus in morientibus in peregrinatione, ubi sæpe eveniebat, ut

the possession of goods or lands, either hath the absolute property or estate in them.

testamentum facere non possent propter penuriam testium civium Romanorum, quæ res etiam usum codicillorum invexit, alter in gratificandis incapacibus, cum scilicet hæres clam fidem, ut incapaci restitueret, Vinnius 489." Whether a gift or legacy upon trust or in confidence, that the donee or legatee would hand it over to a person by law incapable of taking, is very particularly considered by Pothier (Traité des Donations, partie 1, chap. 2. art. 3.) and denied to be in conscience an effective and binding trust. See *Muckleston* v. *Brown*, 6 Ves. 52. 64. Yet to such cause, namely, the incapacity of ecclesiastical bodies to take in mortmain, and the want of legal means to enforce the execution of a trust created for their benefit, may be referred the origin of our equitable system. Gilbert's Lex Prætoria, 259, 260: and though the original purpose of this invention of uses or trusts was disappointed by the 15 Richard II, c. 5, declaring all uses subject to and within the statutes of mortmain, and forfeitable like the lands themselves; "yet the idea having been once introduced, however fraudulently, it afterwards continued to be often innocently, and sometimes very laudably, applied to a number of civil purposes, particularly as it removed the restraint of alienations by will, and permitted the owner of lands, in his life-time, to make various designations of their profits, as prudence or justice, or family convenience might from time to time require, till at length, during our long wars in France, and the subsequent civil commotions between the Houses of York and Lancaster, uses grew almost universal, through the desire that men had, when their lives were continually in

by a sufficient title, or, so far as this is wanting, is considered as a trustee for the true owner. And no man can be deprived of his estate and property, but with his consent, or by order of law; as by some contract or conveyance, or by a forfeiture for some crime, or want of claim in due time, or for some other default or negligence in him; and therefore if a man pays money upon a mistake, it not being intended as a gift, the receiver shall take it only in trust for him that paid it (1); and he may recover it back again even at law (*b*). But if the payment were upon

(1) Buller's Ni. Pri. 131.

hazard, of providing for their children, and of securing their estates from forfeitures, when each of the contending parties, as they became uppermost, alternately attainted the other: Wherefore, about the reign of Edward IV. (before whose time, Lord Bacon remarks, there are not six cases to be found relating to the doctrine of uses), the courts of equity began to reduce them to something of a regular system." 2 Bla. Com. 320. Lex Prætoria, 259, 260: but see *Brent's* Case, 2 Leon. 14, in which the origin of uses is referred to a much earlier period.

(*b*) The receiving of money, which consistently with conscience cannot be retained, is in equity sufficient to raise a trust in favour of the party from whom, or on whose account it was received; but in applying this rule to payments by mistake, it is material to distinguish

an illegal contract, the law will not encourage such engagements so far as to help him again to his money; though if it were unlawful only on the part of the receiver, it might be otherwise (*c*). And the same

mistakes which proceed from ignorance of the law, from those mistakes which are founded on the misapprehension of some fact. With respect to mistakes proceeding from ignorance of law, it is by no means true, that they are universally relievable in equity, or in an equitable action at law, as when a man, not knowing that he was discharged from a debt by the statute of limitations, pays the debt; or being bound in honour and conscience, to any particular payment, makes such payment; for, in all cases in which money is to be recovered back, merely upon principles of equity, the governing question is, whether the defendant can with a safe conscience retain what he has received? *Farmer* v. *Arundel*, 2 Bla. Rep. 824. *Moses* v. *Macferlan*, 2 Burr. 1012. *Munt* v. *Stokes*, 4 Term. Rep. 561. See also *Nichols* v. *Leeson*, 3 Atk. 573. *Atwood* v. *Lamprey*, M. 1719, stated in a note, 3 P. Will. 127: but if money which there was no ground to claim in conscience be paid on a mistake of fact, it may be recovered back. 2 Burr. 1010. *Bize* v. *Dickson*, 1 Term Rep. 285; except where it is paid into court, in which case it cannot. *Malcolm* v. *Fullarton*, 2 Term Rep. 648. See B. 1. c. 2. s. 7.

(*c*) The principal distinction in the civil law upon this point appears, as already observed, B. 1. c. 4. § 4, note (*y*), to have depended upon the turpitude of the contract involving both, or affecting only one of the parties, ubi et dantis, et accipientis turpitudo versatur,

rules may be applied to all other engagements.

non posse repeti dicimus; quotiens autem solius accipientis turpitudo versatur, repeti posse. The law of England also appears formerly to have considered all persons, in any manner connected with an illegal contract, excluded from relief, in respect of what he might have paid under it; but as observed by Lord C. Thurlow, in *Neville* v. *Wilkinson*, 1 Bro. Rep. 547, this rule (See *Tomkins* v. *Barnett*, 1 Salk. 22.) has been broken in upon by many decisions. See *Wilkinson* v. *Kitchen*, 1 Ld. Raymond, 89. And our courts, in the application of it, have even gone so far as to discriminate the different degrees of guilt; and on the ground of such discrimination, have held, that money paid for insuring lottery tickets may be recovered back from the insurer; *Jacques* v. *Golightly*, 2 Bla. Rep. 1073. *Jacques* v. *Withy*, 1 Bla. T. Rep. 65. But that payments by the insurer in pursuance of his engagement cannot be recovered back, *Browning* v. *Morris*, Cowp. 790. Yet in both cases, the whole of the transaction is declared illegal, and prohibited by statute. So in the case of an usurious loan, it is now settled, that the borrower may recover back, either in equity, or at law, the excess of interest; for he cannot be considered to be in pari delicto; *Bosanquet* v. *Dashwood*, Forest, 38. See also *Smith* v. *Bromley*, Dougl. 670. *Jones* v. *Barclay*, Dougl. 669. In what cases equity will decree an account of money received in respect of illegal transactions, see *Watts* v. *Brookes*, 3 Ves. jun.

SECTION II.

Now an use is a trust (*d*), or confidence, which is not issuing out of the land, but as a thing collateral, annexed in privity to the estate, and to the person concerning the land, viz. that cestui que use should take the profits, and that the terre-tenant should make estates according to his direction, and plead such pleas as he should supply him with, at the costs and expence of the cestui que use: so that the cestui que use had neither *jus in re* nor *ad rem*, i. e. nei-

(*d*) Though an use be properly defined to have been a trust, yet it may be material to observe, that even before the statute of uses, there was a clear and established distinction between uses and trusts, uses being of a permanent and general nature, and trusts being of a special and transitory nature, the one being alienable, the other not: and the one not being capable of being limited on a term, which the other might. This distinction is noticed by Lord Bacon, Readings on Uses, and Chief Baron Gilbert: but is much more particularly pursued and illustrated by Mr. Sanders, in his Essay on the Nature and Laws of Uses and Trusts, to which work I beg to refer the reader, who may wish for an accurate and historical detail of the origin of uses and trusts.

ther a right in possession, nor in action, but only a confidence and trust which the common law, though it took notice of, would not protect, nor give him any remedy for it; but his remedy was only by subpœna in Chancery (1) (*e*). And if the

(1) *Chudleigh's* case, 1 Rep. 121. So. Litt. 271. b. *Delemere's* case, Plow. 346. b. See Lord Bacon's Readings on the Sta. of Uses, 303. Gilbert's Law of Uses and Trusts. Sanders's Law of Uses and Trusts. Sheppard's Touchstone, 502. Dr. and Student, Dia. 2. c. 7. *Brent's* case, 2 Leon. 14.

(*e*) It is certainly true, that uses were not protected by courts of common law; the use being at law considered as repugnant to the limitation to the feoffee, and therefore not entitled to prevail (Gilbert's Law of Uses and Trusts, p. 2.); but though they were not allowed to operate at law, they appear to have been particularly protected in equity, and to have been allowed to receive all those various modifications, of which the legal estate itself was capable. Thus an use was held to be descendible, according to the rules of common law; 2 Roll's Ab. 780. Gilb. Uses, 16; or alienable or deviseable, Gilb. Uses, 26, 37. But in such cases, the heir taking by descent, or alienee by grant, or the devisee by will, was in the same precarious situation with respect to the feoffees to uses, as was the original cestui que use; for as to the possession of the land he could not obtain it at law, nor even enter upon it, without the permission of the feoffees, but as a trespasser; 1 Rep. 132. And, as the feoffees had the legal estate, they might at any time disappoint the claim of even a bonâ fide purchaser of the use, by conveying the land for valuable considerations to persons, without notice of the use to which the land was subject; in which case the alienee would be entitled to hold the

feoffees would not perform the order of Chancery, then their persons were to be imprisoned for the breach of the confidence, till they did perform it (2.) For Chancery will not suffer a right in conscience to be without a remedy (3); and the first feoffment shall not come in examination, but only whether in conscience the trust ought not to be performed.

(2) See § 1. note Harg. Law Tracts, 340. *Jones* v. *Morly*, 1 Ld. Raym. 2. 1. See, as to process of sequestration, Wyatt's Pra. Reg. See also *Simmonds* v. *Ld. Kinnard*, 4 Ves. 735.

(3) Francis's Maxims, Max. 6.

land discharged of the use. To check this abuse of confidence, the legislature, at length, interfered, and by 1 Ric. III. c. 1, empowered the cestui que use to enter and make a feoffment; but, as the provisions of the statute did not declare the alienation by the feoffees void, they still had the power to alien until the cestui que use had made such disposition of the land as the statute empowered him to make; so that a statute intended principally to protect the bonâ fide purchaser, became by its abuse an additional means to defraud him; for both the feoffee and the cestui que use having the legal right to alien, they, by several and different feoffments, entangled in dispute and difficulty the different claims derived under them.

SECTION III.

BUT these uses proving a great grievance to the kingdom (1), and therefore esteemed odious in the law, they being founded usually in fraud, to evade the statutes of mortmain, or to prevent forfeitures, or the wardship of the heir, or just debts, and the like; for they were accounted in law neither chattel nor hereditament, and were no assets to the executor or heir (2), neither could they be forfeited (3.) The statute of 27 H. VIII. cap. 10. (*f*), to prevent these

(1) Bacon's Use of the Law, 154. 2 Bla. Com. 331.

(2) Sanders's Uses, 110. Gilb. Uses, 37.

(3) Gilb. Uses, 38. Hard. 466, 467, 492, 495. *Burgess* v. *Wheate*, 1 Bla. Rep. 123.

(*f*) Lord Bacon, who appears to have given a more than ordinary degree of attention to the doctrine of uses, observes, that, "by this course of putting lands into use, there were many inconveniences, as the practice which originated in a reasonable cause, (viz. to give men power and liberty to dispose of their own), was turned to deceive many of their just and reasonable rights; as, namely, a man that had cause to sue for his land, knew not against whom to bring his action, nor who was owner of it. The wife was defrauded of her thirds, the husband of being tenant by curtesy, the lord of his wardship, relief, heriot, and escheat; the creditor of his extent for debt, the poor tenant of his lease; for the rights and duties were given by law from him that was owner of the land, and none other, which

inconveniences, hath since executed the possession to the use, so that such uses have now the same qualities, as estates at common law, and a rent may be reserved out

was now the feoffee, in trust, and so the old owner, which we call the feoffor, should take the profits, and leave the power to dispose of the land at his discretion to the feoffee." Use of the Law, 153. To remedy these inconveniences, various statutes were provided. By 1 H. VI. and 4 H. VIII. it was enacted, that actions for the land may be brought against the person taking the profits, who was the cestui que use; by 1 Rich. III. leases and estates made by cestui que use are made good; by 4 H. VIII. the heir of cestui que use is to be in ward; by 10 H. VII. the lord is declared to have relief upon the death of any cestui que use; and by the 19 of H. VII. c. 15, the lands of cestui que use are declared to be subject to his creditors. These legislative provisions were, however, insufficient to suppress that variety of frauds to which the practice of conveyances to uses had given rise; but as they all tended to consider the cestui que use as the real owner of the estate, that idea was, at length, carried into full effect by the statute 27 H. VIII. usually called the Statute of Uses, which, after reciting the above-mentioned inconveniences, which had grown out of the practice of conveying to uses, enacts, that when any person shall be *seised* of lands, &c. to the use, confidence, or trust of any other person or body politic, the person or corporation entitled to the use in fee simple, fee tail, for life, or for years, or otherwise, shall henceforth stand, or be seised or possessed of the land, &c. of and in the like estates as they have in the use, trust, or confidence; and that

of them (4). And there shall be a tenancy by the curtesy of such an estate vested, and it shall be assets (5); for the use and possession pass by virtue of the statute both together in one instant, tanquam uno flatu: and a bargain and sale of an estate for years is capable of release by this statute, and so is the constant practice: which method of conveyance was first devised by Sir Francis Moore (6). Yet actual possession is not in the cestui que use by this statute; neither upon such a seisin can he maintain an action for trespass; for it is impossible an act of parliament should give any more than a civil seisin (7). And Mr. Noy was of opinion, that this conveyance by lease and release (g) could never be maintained, with-

(4) 27 H. 8. c. 10. § 5.

(5) *Castle* v. *Dod*, Cro. Jac. 201. 1 And. 275. 338. 2 Bla. Com. 333.

(6) *Lutwick* v. *Mitton*, Cro. Jac. 604. *Iseham* v. *Morrice*, Cro. Car. 110. *Saffyn*'s case, 5 Rep. 124. *Barker* v. *Keate*, 2 Mod. 252. 2 Vents. 35. Co. Litt. 270. 276. Mr. Butler's note (2).

(7) Gilb. Uses, 230.

the estates of the person so seised to uses, shall be deemed to be in him or them that have the use, in such quality, manner, form, or condition as they had before in the use.

(g) "The form of conveyance by lease and release is originally derived from the common law. It is necessary, therefore, to distinguish in what respects it operates as a common law conveyance, and in what it operates under the statute of uses. At common law, when the usual mode of conveyance was by feoffment, with livery of seisin, if there was a tenant in possession, so that livery could not be made, the reversion was

out the actual entry of the lessee, as the ancient course was (8): and in the case of

(8) *Barker* v. *Keate*, 2 Mod. 252.

granted, and the tenant attorned to the reversioner, as by this mode the reversion or remainder of an estate might be conveyed without livery, when it depended on an estate previously existing, it was natural to proceed one step further, and to create a particular estate, for the express and sole purpose of conveying the reversion, and then, by a surrender or release either of the particular estate to the reversioner, or of the reversion to the particular tenant, the whole fee vested in the surrenderee or releasee. It was afterwards observed, that there was no necessity to grant the reversion to a stranger; and that if a particular estate was made to the person to whom it was proposed to convey the fee, the reversion might be immediately released to him; which release operating by way of enlargement, would give the releasee the fee. In all these cases, the particular estate was only an estate for years; for, at the common law, the ceremony of seisin is as necessary to create an estate of freehold, as it is to create an estate of inheritance; still an actual entry would be necessary on the part of the particular tenant; for without actual possession the lessee is not capable of a release operating by way of enlargement. But this necessity of entry for the purpose of obtaining the possession was superseded or made unnecessary by the statute of uses; for by that statute the possession was immediately transferred to the cestui que use; so that a bargainee under that statute is as much in possession, and as much capable of a release before or without entry, as a lessee is at common law after entry. All, therefore, that remained to be done, to avoid, on the one hand, the necessity of livery of seisin from the

a common law lease, this may, perhaps, be true, for the estates are not divided till then, and so no privity (9).

(9) *Saffyn's* case, 5 Rep. 124. b. Litt. § 459.

grantor, and to avoid, on the other, the necessity of an actual entry on the part of the grantee, was that the particular estate, (which, for the reasons above mentioned, should be an estate for years) should be so framed as to be a bargain and sale within the statute. Originally it was made in such a manner, as to be both a lease at the common law, and a bargain and sale within the statute. But, as it is held, that where conveyances may operate both by the common law and statute, they shall be considered to operate by the common law, (See *Lord Altham* v. *E. of Anglesey*, Gilb. Rep. 17,) it became the practice to insert among the operative words, the words Bargain and Sale: in fact, it is more accurate to insert no other operative words, and to express that the bargain and sale, or lease, is made to the intent and purpose, that thereby, and by the statute of uses, the lessee may be capable of a release. The bargain and sale, therefore, or the lease for a year, as it is generally called, operates, and the bargainee is in possession by the statute." Mr. Butler's Note, Co. Litt. 275, b. 276, a. See also Mr. Sanders on Uses and Trust, p. 96, 394, Sheppard's Touchstone, ch. 10, and Mr. Sugden's Note, p. 224, in his edition of Gilbert's Uses, where this mode of conveyance is considered.

SECTION IV.

YET, notwithstanding this statute, there are three ways of creating an use or a trust, which still remains a creature of the court of equity (*h*), and subject only to their

(*h*) The legislature, by the statute 27 H. VIII. c. 16, is thought by Lord Coke (1 Rep. 125) to have intended to abolish uses and trusts. But see Lord Bacon's Readings on the statute. If such was the intention, courts of law, by too strict a construction of its provisions, defeated it, and rendered it necessary for courts of equity to retain that jurisdiction, of which a more liberal interpretation of the statute by courts of law would probably have deprived them; so that, as Lord Hardwicke observes, "A statute made upon great consideration, introduced in a solemn and pompous manner, by a strict construction, has had no other effect than to add at most three words to a conveyance." *Hopkins* v. *Hopkins* (1 Atk. 591.) Courts of equity, in the exercise of this jurisdiction, have, however, wisely avoided, in a great degree, those mischiefs which made uses intolerable. They now consider a trust estate (either when expressly declared or resulting by necessary implication) as equivalent to the legal ownership, governed by the same rules of property, and liable to every charge in equity, (except dower) and consequence, (except escheat) to which the other is subject in law; and by a long series of uniform determinations for now near a

control and direction (1). 1st. Where a man seised in fee, raises a term for years, and limits it in trust for *A.* &c. for this the statute cannot execute, the termor not being seised (2). And the law is the same of annuities and personal chattels; for the statute intended to remit the common law, and chattels might ever (*i*) pass by testament or parol only. And the word (Person) excludes all dead uses, which are not to bodies living and natural (3). 2dly, Where lands are limited to the use of *A.* in trust, to permit *B.* to receive the rents and profits; for the statute can only execute the first use. And the common law rejected the second use as void; but Chancery considered the intent of the conveyance (4). 3dly, Where lands are limited to trustees to receive, and pay over the rents and profits to such and such persons; for here the lands must remain in

(1) *Simpson* v. *Turner*, 1 Eq. Ca. Ab. 383. Marg.

(2) Dyer, 369, a. Moor, 61. Sheppard's Touchstone, 506, 507.

(3) Ld. Bacon's Readings on St. of Uses, 334, 335.

(4) Dyer, 155. *Chudleigh's* case, 1 Rep. 236, b. 1 Atk. 591. See *Ash* v. *Gallen*, Ch. Ca. 114, 115.

century past, with some assistance from the legislature, they have raised a new system of rational jurisprudence, by which trusts are made to answer in general all the beneficial ends of uses, without their inconvenience or frauds; 2 Bla. Com. 337.

(*i*) Since the statute of frauds, s. 3. real chattels, as a lease, will not pass by parol; but see 3 Salk. 312.

them to answer these purposes (5); otherwise they would be the trustees, contrary to the express words of the will, or other conveyance.

(5) *Nevil* v. *Sanders*, 1 Vern. 415. *Symson* v. *Turner*, 1 Eq. Ca. Ab. 383. *South* v. *Allen*, 1 Salk. 228.

Jones v. *Lord Say and Seale*, 1 Eq. Ca. Ab. 383. 3 Bro. P. C. 458. *Shapland* v. *Smith*, 1 Bro. Ch. Rep. 75. *Sylvester* v. *Wilson*, 2 Term Rep. 444. But see *Broughton* v. *Langley*, 2 Salk. 679. 2 L. Raym. 873. 1 Eq. Ca. Ab. 385. pl. 3. *Baily* v. *Ekins*, 7 Ves. 322. 2 Bro. Ch. R. 94. *Carwardine* v. *Carwardine*, 1 Eden's R. 36, note (*a*).

SECTION V.

And the statute did no more, in executing the possession to the use in the same plight as he had the use (1), than equity would have done before: so that uses are raised by the same conveyances and agreements, as before the statute (2). And, at common law, they being a creature of equity, that is, only an equitable right or conscience, and no possession, are guided entirely by the rules of equity (3), and not subject to the rules of common law (*k*),

(1) Co. Litt. 22. b.

(2) Sheppard's Touchstone, 507. Sanders on Uses, 154, 155.

(3) Ld. Bacon's Reading, 324. Gilbert's Uses, 102.

(*k*) By the operation of the statute, such uses as are within it become legal estates; but there are some in-

though in a deed. For the operation of the statute is, by the bringing the possession to the use, and not the use to the possession (4). So that although, after they are executed by the statute, uses seem not to differ from the possession; yet before they are governed by equity (5), and the not regarding this, but striving to construe them by the strict rules of common law, was the cause of many erroneous opinions, both before and after the statute.

(4) Ld. Bacon's Readings, 226.

(5) *Chudleigh's* case, 1 Rep.

stances in which, in the construction of uses, courts of law will, in the advancement of the convenience of which the modification of estates by way of use has been found productive, depart from the strict rules of the common law. See Gilb. Uses, 77. Sanders' Uses, 170. With respect to such uses as are not executed by the statute, but remain solely cognizable in equity, it has been held in some cases that they are not to be construed by the rules of law, but are to receive a more liberal construction in favour of the intent; and, in other cases, it has been determined, that the construction of limitations of trust estates must be the same as the construction of similar limitations of legal estates; and that in the construction of both trust and legal estates, the intention is equally to be attended to. I have already had occasion (see B. 1. c. 6. s. 7, 8) to observe upon the different decisions relating to this point, and shall, therefore, confine my present observations to what I conceive to be the result of the cases upon it. That in the construction of wills or of deeds,

the construction of trust estates is the same as the construction of legal estates, provided such trust be not executory, in which case, I conceive, courts of equity have a much larger discretion for the purpose of effectuating the intent, than they have in the construction of trusts particularly drawn out by the author of the trust. As to what is intended by executory, see note above referred to.

CHAP. II.

Of the Creation of Uses.

SECTION I.

Now an use at common law might be created two ways. 1st, By the intent of the parties upon transmutation of the possession (1). Or, 2dly, By an agreement made upon an effectual consideration (*a*), without transmutation of possession (2). The intent, upon transmutation of the possession, might be declared by writing or by parol (*b*). For the use was there ac-

(1) Co. Litt. 271. b. Gilb. Uses, 75.

(2.) Gilb. Uses, 82. Plowd. 302.

(*a*) Uses which pass by transmutation of possession, are raised by feoffment, fine, or recovery; Gilb. on Uses, p. 75; and also by lease and release, *Lloyd* v. *Spillet*, Barnard. 384. Uses raised without transmutation of possession, are raised either by way of bargain and sale enrolled, in consideration of money, or by way of covenant, to stand seised in consideration of blood; Gilb. Uses, 82.

(*b*) Whether an use could in any case be raised at common law by parol, or even by writing without seal, seems to have been formerly very much doubted; *Hore* v. *Dix*, Siderf. 26. Dyer, 296, b.; *Berries* v. *Bowyer*,

cording to the intent, and no matter how that intent was manifested (3), since an use is but a trust, which is not like land, for land cannot pass without livery; but an use one may give or devise (c) at his pleasure by nude parol, for a devise is as a gift (4). And so the practice was before the statute, of

(3) *Jones* v. *Morley*, 1 Salk. 677. Shower's Parl. Ca. 145.

(4) *Chudleigh's* case, 1 Rep. 121. b. Wright's Tenures, 174.

2 Show. 158. Chief Baron Gilbert has, however, extracted from the different cases the distinction, which will, in some degree, reconcile their apparent contrariety. "At common law," says he, "an use might have been raised by word upon a conveyance that passed the possession by some solemn act, as a feoffment; but where there was no such act, there it seems a deed declaratory of the uses was necessary, for as a feoffment which passed the estate might be made at common law by parol, so, by the same reason, might the uses of the estate be declared by parol; but where a deed was requisite to the passing of the estate itself, it seems it was necessary for the declaration of the uses: therefore a man could not covenant to stand seised to an use without a deed, there being no solemn act." Gilb. Uses, 270, 271, 48—57. *Collard* v. *Collard*, Poph. 47. Moor, 688. Shep. Touchstone, 519; *Shortridge* v. *Lamplugh*, 7 Mod. 71. 1 Salk. 678.

(c) At common law, lands (except by special custom) were not devisable; but, by the invention of uses, they were before the statute of uses effectively, though not directly made so; for by feoffment to such uses as the feoffor should by his last will declare, he might arrange and modify the succession to the profits of the

wills, to put their lands in use, that they might pass without livery (5); and the limitation of the uses was to be by him who had the estate in the land according to his intent (6). For if no intent was expressed, nor consideration effectual implied (*d*), the

(5) Lord Bacon's Use of the Law, 152.

(6) *Pybus* v. *Mitford*, Ventr. 372.

land, and equity would enforce the performance of the trust, Wright's Tenures, 174; and such trust, or uses more strictly speaking, might be limited by a nuncupative will. *Chudleigh's* case, 1 Rep. 124.

(*d*) In Dyer, 146, b. a distinction is taken upon this point between feoffments of which the uses were not declared, nor consideration effectual implied, before the statute of *quia emptores terrarum*, and feoffments after the statute; feoffments before the statute being held in such case to raise an use to the feoffee, in respect of the tenure which might then have subsisted between the feoffor and the feoffee; but the statute having taken away such tenure, the feoffment was conceived to be wholly wanting of consideration, and therefore should be to the use of the feoffor. This distinction is, however, rejected by Lord Bacon, who is of opinion, "That the intendment of an use to the feoffor, where the feoffment was made without consideration, grew long after, when uses waxed general; and for this reason, because when feoffments were made, it grew doubtful whether the estates were in use or in purchase; because purchases were things notorious, and uses were things secret. The Chancellor thought it more convenient to put the purchaser to prove his consideration, than the feoffor and his heirs to prove the trust; and so made the intendments to-

use arose to the same person who gave the estate (7), and the use ensued the ownership of the land, without having regard to estoppels, which are adverse to truth and equity: for the conveyance standing indifferent, the Chancery thought it best to put the proof upon him who took the possession, and if he failed, would have compelled a re-conveyance (8). But where there was an express consideration, an use limited contrary to it was void; as if upon a sale or lease with rent reserved, the use were limited to the vendor or lessor (9): otherwise of a consideration implied: as in a devise to an use (10), the use may be exe-

(7) Sheppard's Touchstone, 501. Co. Litt. 23 Perkins, § 533. 2 Roll. Ab. 789. Dyer, 146. b. Gilb. Uses, 222.

(8) Ld. Bacon's Reading on Stat. of Uses, 317.

(9) Dyer, 155. a. 1 Leon. 148. 1 Ander. 37. pl. 96. 2 Ander. 136.

(10) *Hartop's* case, 1 Leon. 254. Lutw. 823. Gilbert's Uses, 281. *Burchett* v. *Durdant*, 2 Ventr. 312. *Broughton* v. *Langley*, 2 Ld. Raym. 875.

wards the use, and put the proof upon the purchaser." Reading on Stat. of Uses, 317. It seems, however, admitted, that if the feoffor declare no use, and no effectual consideration be implied, that the use will result to him: so if he do not limit the whole of the estate, except in the case hereafter noticed, the residue will result. But if tenant of a particular estate, as tenant for life, grant his estate by fine, and limit the use for years, or for a particular time, it shall not return unto him; because he who hath the particular estate by fine, is subject to rent and forfeiture, which is a sufficient consideration; 2 Roll. Ab. 781. *Castle* v. *Dod*, Cro. Jac. 200.

cuted (*e*), if the intent of the devisor appear to be so. Yet a devise imports a consideration in itself, and therefore cannot be averred to be to the use of another than of the devisee, or for a jointure, unless it be expressed in the will (11).

(11) *Vernon's* case, 4 Rep. 4. a.

(*e*) That in a devise to an use, the use may be executed, if such appear to have been the intent of the devisor, seems agreed in all the cases; but it has been much doubted whether the execution of the use ought to be referred to the operation of the statute of uses, or to the operation of the statute of wills. In *Hore* v. *Dix*, Sid. 26. it is held, that the use is executed by the statute of wills, and not by the statute of uses; and this opinion Mr. Butler, in a very learned note, seems to prefer, Co. Litt. 278. But Mr. Powell, in his Essay upon the Learning of Devises, Vol. I. p. 277, maintains, that the better opinion is, that a devise to uses is executed by the statute of uses, and does with very considerable force and effect meet the objections urged against such opinion. The cases on which he relies as express authorities, are *Broughton* v. *Langley*, 2 Lord Raym. 873. *Popham* v. *Bamfield*, 1 Vern. 79. But whether the effect of the devise to uses be referrable to the one statute, or to the other, or to the joint operation of both, is at this time a point so purely speculative, that I shall content myself with referring the reader to the above note by Mr. Butler, and the reasoning relied on by Mr. Powell.

SECTION II.

AN agreement (*f*) to raise an equity to have the land ought to have an effectual consideration; as money, pains, and travel, marriage, or natural affection. For an use will not arise either by deed (*g*), or deed

(*f*) Uses which are to be raised by covenant or agreement must be founded on principles of equity; for the cestui que use can have no right by law; therefore no use can be raised by covenant or agreement, without a consideration; for equity or conscience will not enforce *donum gratuitum, Colman* v. *Sarrel*, 1 Ves. jr. 50. however apparent the intent, where it is not sufficiently passed by law; Lord Bacon's Readings on Stat. of Uses, 310. And in this consists another distinction, between uses raised by covenant and uses raised by conveyance, which operate by transmutation of possession; for though, if there be no use declared, nor consideration given, the use will be to the feoffor, &c. yet if there be an use declared, though there be no consideration to support it, the use will be effective; Gilb. Uses, 222, 223, 42, 2 Roll's Ab. 791. 1 Ander. 37. pl. 95. Perk. § 537. *Calthorpe's* Case, Moore, 102. *Mildmay's* Case, 1 Rep. 176. b. *Stephens* v. *Layton*, Owen, 40. Sanders' Uses and Trusts, 93, 94. See also *Lloyd* v. *Spillet*, Barnard, 384. 2 Atk. 148.

(*g*) This must not be understood of such uses as operate by transmutation of possession, which, as

enrolled, without an actual (*h*) consideration (1): although a deed, for the solemnity, imports a consideration in law (2). And there are two sorts of good consideration: a consideration of nature and blood, and a valuable consideration (3). But there is a

(1) Gilb. Uses, 217. 2 Bla. Com. 330. Sheppard's Touchstone, 510.

(2) Bacon's Reading on St. of Uses, 310. Plowd. 303. See 1 vol. b. 1. c. 5. § 1. n. (*a*).

(3) 2 Bla. Com. 297. *Twyne*'s case, 3 Rep. 88.

already observed, require no consideration, if the use be declared; *Garnish* v. *Wentworth*, Carter, 143. Gilb. Uses, Sugd. ed. 91.

(*h*) Though a consideration be absolutely requisite to the raising of an use, upon a covenant to stand seised, yet no consideration need be mentioned in the deed: but if the cestui que use stand in a relation which affords of itself a consideration, an use shall presently arise to him; as if a man covenant to stand seised to the use of his wife or brother, or any of his kindred, this is sufficient to raise an use to them, without any mention of a particular express consideration: for the love and affection between them is obvious; which being a consideration in itself sufficient to raise an use, the limiting of the use shall be referred to such consideration. Gilb. Uses, 251, 252. *Bedell*'s Case, 7 Rep. 40. And so with respect to uses raised by bargain and sale; for though they can only be raised for an actual and valuable consideration, yet the consideration need not necessarily be expressed in the deed, in order to raise the use; for the bargainee may aver, that money or other valuable consideration was given or paid; and if shewn, the bargain and sale shall be good. 2 Roll's Ab. 790, pl. 3. 2 Inst. 672.

difference between them, that money may be given by one, in consideration of all the estates; for in being given for them, they are made parties to the consideration (4): but natural affection will not raise an use to a stranger (*i*) to the consideration. And this is the reason, that a general power (*k*),

(4) 2 Roll's Ab. 784. pl. 7. 2 Inst. 672.

(*i*) When it is stated, that covenants to raise an use must be founded on principles of conscience and equity, it might be concluded that every moral obligation would furnish a sufficient consideration to raise an use; such conclusion, however, would not be correctly drawn, it having been determined, that affection to an illegitimate child is not a sufficient consideration to raise an use, by way of covenant, to stand seised. 1 Ander. 75. 79. 2 Roll's Ab. 785. Co. Lit. 123. Harg. note (8). Still less is the consideration of friendship, long acquaintance, or having been school-fellows; 2 Roll's Ab. 783, pl. 5, 6. But if a man, in consideration of natural love and affection, covenant to stand seised to the use of his son for life, remainder to such woman as the son should marry, for life, remainder to the first son of the son on such wife begotten, the estate limited to the wife is well raised, though the wife be a stranger to the consideration; for it is for the advancement of the posterity of the covenantor; for without a wife his son cannot have posterity; *Bolls* v. *Sir H. Winton.* Noy. 122. So a covenant to stand seised to the use of the wife of the brother of the covenantor is good, for the love which he bears to his brother extends in his right to his wife; Plowd. 307.

(*k*) This must be understood of powers created by such conveyances as require an actual and effectual consideration to support them. *Mildmay*'s case, 1 Rep.

in such case to make leases, or limit uses, to any body, is void. So that a limitation afterwards, though to his daughter, is not good: for a good execution will not profit, where the constitution is defective. And in a covenant to stand seised, where the consideration is general, and the person uncertain, no averment can be taken (5): but when the person is certain, such an averment may be taken as stands with the deed. And so where the consideration is particular and certain, as of brotherly love or advancement of his blood, there the person by matter *ex post facto*, may be made certain (6). And although there be a consideration expressed (*l*), yet any other may be taken, as stands with it, and is not repugnant (7). And it matters not whether the consideration be past, present, or future (8):

(5) *Mildmay's* case, 1 Rep. 176. b. *Chute* v.——, 2 Lev. 30. 2 Roll's Ab. 260. *Crop* v. *Faustenditch*, Cro. Jac. 181. Gilb. Uses, 218.

(6) *Mildmay's* case, 1 Rep. 176. b.

(7) *Bedell's* case, 7 Co. 40. Dyer, 146. 2 Roll's Ab. 790. *Filmer* v. *Gott*, 7 Bro. P. C. 70. 136. *Stephens* v. *Brittedge*, Sid. 83.

(8) *Chudleigh's* case, 1 Rep. 126. *Woodliff* v. *Drury*, Cro. Eliz. 439.

176. b. Chief Baron Gilbert, observing upon this doctrine, doubts whether, if the covenantee had paid money he might not have averred it, and so made good the use to his nominee; Gilb. Uses, 220. See *Prince and Wife* v. *Green* cited, in *Wilmer* v. *Kendrick*, 1 Ch. Ca. 161. *Warrick* v. *Gerard*, 1 Vern. 7.

(*l*) As to what evidence is admissible, to extend or explain a consideration expressed, see 1 vol. b. 1. c. 3. § 11. note (*o*).

only a consideration executory will not raise an use, till it be executed (*m*). Neither in a valuable consideration (9) is the quantum regarded in law (*n*). Nor any averment

(9) *Barker* v. *Kate*, 2 Ventr. 35. *Lloyd* v. *Spillet*, 2 Atk. 148. Barnard, 384. *Anon.* 22. Vin. Ab. 202. pl. 2. T. 41 Eliz. B. R.

(*m*) For to every execution of an use by force of the statute of uses, four things, as hereafter more particularly mentioned, are requisite. 1st, There ought to be a person seised; for the words of the act are, any person stand or be seised, &c. 2dly, There ought to be a cestui que use *in esse*; for the words of the act are, stand seised to the use of any person or persons, &c. 3dly, There ought to be an use *in esse*, sci. in possession, reversion, or remainder. 4thly, The estate, out of which the use rises, ought to be vested in the cestui que use; for the words are, that the estate of such person seised to the use shall be adjudged in cestui que use, &c. So that when these four requisites concur, the use is executed within this statute; but if any of them fail, it is not; and therefore it is agreed in *Delamere's* case, Plowd. 351, that the statute 27 H. VIII. does not execute any use, but only uses *in esse*; so a right of a present use, or a future or contingent use, are excluded until they come *in esse*. *Chudleigh's* case, 1 Rep. 126, a. 136, a; and therefore such future and contingent uses may be destroyed by alterations of the estate before they come *in esse*. *Chudleigh's* case, 1 Rep. 138, a. See post, B. 2. c. 6. § 1.

(*n*) In purchases, the question is not whether the consideration be adequate, but whether it be valuable; for if it be such a consideration as will, without fraud, make

allowed to the heirs, that the consideration expressed was false, or not paid; for he is estopped by the deed. And upon these considerations, if any agreement be made by the owner of the land, this agreement makes a sufficient equity, for those to have the land to whom it is appointed by the agreement (*o*). For if an equivalent be given, though the contract be not executed with all the formalities of law; yet in equity the use of the lands ought to be in the purchaser (10). And so if a man parts with any lands in advancement of his issue, and to provide for the contingencies, and necessary settlements of his family, it is fit the

(10) Gilb. Uses, 49.

a man a purchaser within the statute of Elizabeth, and bring him within the protection of that law, he shall not be impeached in equity. *Basset* v. *Nosworthy*, Finch's Rep. 104. *Hobart* v. *Hobart*, 2 Ch. Ca. 159. But see *More* v. *Mayhow*, 2 Freem. 175. 1 Ch. Ca. 34. But if the consideration be grossly inadequate, as five shillings; Qu. Whether a trust will not result for the grantor? See *Sculthorpe* v. *Burgess*, 1 Ves. jun. 92. See also *Walker* v. *Burrows*, 1 Atk. 94. But see *Lloyd* v. *Spillet*, 2 Atk. 150. Barnard, 384.

(*o*) This proposition must be understood with reference to those general rules which govern courts of equity, in the enforcing of agreements by specific performance. See B. 1. c. 1. s. 4; c. 3. s. 1.

Chancery should make such conveyance good, though they want the ceremonies of law (*p*), so as they may best comply with the peace of families; for their establishment is part of the nature and end of government (11). But if I bargain and sell land to my son, no use arises, unless there be a consideration of money (*q*); for selling,

(11) Gilb. Uses, 47. *Coltman* v. *Senhouse*, 3 Lev. 225.

(*p*) This equity of supplying defective conveyances does not extend to all such persons in whose favour the relation of blood would support a covenant, to stand seised to their use, nor does it even now extend to a grandchild. *Tudor* v. *Anson*, 2 Ves. 582. *Perry* v. *Whitehead*, 6 Ves. 544. See B. 1. c. 1. s. 7; though it was once held that it did. *Watts* v. *Bullas*, 1 P. Wms. 61. *Freestone* v. *Rant*, T. 1712. *Fursaker* v. *Robinson*, Pre. Ch. 475. And in *Goring* v. *Nash*, 3 Atk. 189, Lord Hardwicke observed, that it would be pursuing the maxims of law too far, for it would carry it to the remotest blood that could raise an use in law, and which equity does not regard.

(*q*) But if a father, in consideration of natural love and affection, and of 100*l.* covenant to stand seised to the use of his son, the principal consideration will carry it, and there needs no enrolment. *Garnish* v. *Wentworth*, Carter, 144. *Baker* v. *Lade*, 3 Lev. 291. 2 Vent. 149. *Foster* v. *Foster*, 1 Lev. 55; which would have been requisite if the covenant had been to stand seised to the use of a son, merely in consideration of 100*l.* the deed in such case operating as a bargain and sale. *Bedell*'s case, 7 Rep. 40. b. *Fox*'s case, 8 Rep. 96.

ex vi termini, supposes my transferring a right of something for money, the common medium of commerce (12). And if there be no such consideration, it may be an exchange, a covenant to stand seised, a grant, &c. but it can be no sale (13).

(12) Gilb. Uses, 50.

(13) Gilb. Uses, 245. Sugd. ed. note (6). *Ward* v. *Lambert*, Cro. Eliz. 894.

SECTION III.

And it was much controverted at first (*r*), whether a deed were necessary to the raising of an use (1). In a bargain and sale, it was agreed on all sides not to have been required at common law, by reason of the consideration given for the land (2); and that was the cause why the fee simple would pass at common law, without the word heirs

(1) *Hore* v. *Dick*, Sid. 26. Dyer, 296.

(2) Gilb. Uses, 271. *Collard* v. *Collard*, Poph. 49. See B. 2. c. 2. § 1. note (*b*).

(*r*) I have already had occasion to refer to the distinctions upon this point; and as all trusts, except trusts resulting by operation of law or equity, must now be declared in writing, it seems unnecessary to investigate more particularly the distinctions which prevailed at common law.

heirs (*s*). And it was said that a man's blood, and the building up of a family, is of more value to him than his money (*t*). And where, throughout the whole body of the law, shall it be seen, that to any thing which may pass by contract, there needs any other thing than the words which make the contract, as writing, or the like testifying it? And that the law was so, appears by the statute of 27 H. VIII. (*u*), which

(*s*) "Before the statute of uses, 17 H. VIII. if a man bargained and sold his lands for money generally, without inserting words of inheritance, equity would oblige him, according to conscience and the intent of the parties, in regard of the value, to have executed an estate in fee; but since the statute, the uses are transferred and made into an estate in the land; and therefore, since the statute, if one bargain and sell his lands generally, the bargainee hath but an estate for life." *Corbet*'s case, 1 Rep. 87, b; *Shelley*'s case, 1 Rep. 100, b. Gilb. Uses, 17, 18; *Abraham* v. *Twigg*, Cro. Eliz. 478.

(*t*) And as such consideration was alleged to be of an higher nature, it was conceived to be a necessary inference, that the use of a covenant to stand seised might be declared by parol; but this inference is not warranted. Gilb. Uses, 271.

(*u*) By 27 H. VIII. c. 16, all conveyances of an estate of freehold in lands, &c. by bargain and sale, must be enrolled within six months. See vol. 1. p. 217, note (*m*).

was made to alter it as to the freehold in bargains and sales (3); but, by an exception at the end of the statute, London is, as it was, at common law (4). And uses, in such cases, in respect of marriage, which is always a thing public and notorious, were for the solemnity left at common law, and not restrained, as the bargain and sale, which by common presumption may be made more secretly and easily (5). Yet notwithstanding these reasons, this point hath been since clearly determined otherwise; for the mischief that would follow, if an use should arise without a settled resolution, manifested by a deed (6).

(3) *Collard* v. *Collard*, Poph. 48.

(4) 27 H. 8. c. 16. § 2. Dyer, 229. pl. 50.

(5) *Collard* v. *Collard*, Poph. 47.

(6) *Collard* v. *Collard*, Moor, 668.

SECTION IV.

AND now, by statute 29 Car. II. (1) (*x*), although a lease for three years, &c. may

(1) *Riddle* v. *Emerson*, 1 Vern. 108.

(*x*) The inconveniences which were found to arise from the allowing of parol declarations of trust, induced the legislature, by the 29 Car. II. c. 3. § 7, to require all declarations, or creations of trusts or confidence, of any lands, tenements, or hereditaments, to be manifested and proved by some writing, signed by the party who is by law entitled to declare such trusts, or by his last will in writing. The statute, however, excepts trusts arising, transferred, or extinguished by operation of law. Upon this legislative provision, it is observable, that it does not extend to declarations of trusts of personalty; *Nab* v. *Nab*, 10 Mod. 404. But see *Lady M. Fordyce* v. *Willis*, 3 Bro. Ch. Rep. 577. Neither does it prescribe any particular form or solemnity in writing; a trust of land may, therefore, be declared by writing without seal, if it sufficiently indicate and notify the intention of the parties that there should be a trust; *Shortridge* v. *Lamplugh*, 7 Mod. 73; or by letter from the trustee, stating the trusts, *Crook* v. *Brooking*, 2 Vern. 106; *Muckleston* v. *Brown*, 6 Ves. 52; or by a bond to perform the trusts of a conveyance referred to, though the trusts be not stated in the bond; *Attorney General* v. *Twisden*, Finch's Rep. 336; or by a bond to cestui que trust to assign as he should direct; *Moorcroft* v. *Dowding*, 2 P. Wms. 314. See also *Parks* v. *Wilson*, 10 Mod. 515; or by an answer in

be made by parol; yet when it is made in writing, the trust of that lease can-

equity, confessing a trust; *Cottington* v. *Fletcher*, 2 Atk. 155; or by declaration, that the purchase was made with trust money; *Deg* v. *Deg*, 2 P. Wms. 414; *Kirk* v. *Webb*, Pre. Ch. 84. Neither does the statute prescribe any particular form or mode of expression, as necessary to raise a trust; therefore if a testator, having devised the whole of his estate, will that the devisee pay his debts, it is sufficient to raise a trust for creditors; *Clowdsly* v. *Pelham*, 1 Vere. 411. So words of desire or request in a will, if the property be certain, and the objects certain, will be sufficient to raise a trust; *Eacles* v. *England*, 2 Vern. 466; *Miller* v. *Warren*, 2 Vern. 207; *Birkhead* v. *Coward*, 2 Vern. 116; *Glynn* v. *Harding*, 1 Atk. 460; *Vernon* v. *Vernon*, Ambl. 4; *Palmer* v. *Scribb*, 8 Vin. Ab. 289. pl. 25; *Harland* v. *Trigg*, 1 Bro. Ch. Rep. 142; *Nowland* v. *Nelligan*, 1 Bro. Ch. Rep. 489; *Pierson* v. *Garnett*, 2 Bro. Ch. Rep. 38. 226; *Richardson* v. *Chapman*, Burn's Eccl. Law, Tit. Bishop, p. 220, 5th ed. (But see the case cited in *Civil* v. *Rich*, 1 Ch. Ca. 310.) *Medlicot* v. *Bowes*, 1 Ves. 207; *Cole* v. *Wade*, 16 Ves. 27. So words, not doubting but that the devisee or legatee will dispose of the fund devised in a particular manner, if the fund be certain, and the objects distinctly described, will be sufficient; *Massey* v. *Sherman*, Ambl. 520; *Wynne* v. *Hawkins*, 1 Bro. Ch. Rep. 179; *Nowlan* v. *Nelligan*, 1 Bro. Ch. Rep. 491; *Paul* v. *Compton*, 8 Ves. 380; *Cruwys* v. *Colman*, 9 Ves. 323. But see *Buggins* v. *Yates*, 9 Mod. 122; and it seems now to be settled that words merely of recommendation, by a person having power to command, shall create a trust; *Malim* v. *Keighley*, 2 Ves. jun. 333, 529. But see *Pushman* v.

not be declared by parol (*y*). But a confession of a trust in an answer for the wife and children, though no proof of it, will be good in equity (2). So if the son prevails upon the mother, to get the father to make a new will, and make him executor in her stead, promising himself to be a trustee for the mother; this will to be decreed a trust for the wife, on the point of fraud (*z*), notwithstanding the statute of frauds and perjuries (3).

(2) *Hampton* v. *Spencer*, 2 Vern. 288. *Cottington* v. *Fletcher*, 2 Atk. 155.

(3) *Roswell* v. *Every*, 1 Roll's Ab. 378. pl. 1.

4 Vin. Ab. 395. pl. 3. *Thynn* v. *Thynn*, 1 Vern. 296. *Sellack* v. *Harris*, 5 Vin. Ab. 521. pl. 31. *Davenish* v. *Baines*, Pre. Ch. 3. *Oldham* v. *Litchford*, 2 Vern. 506. *Reech* v. *Kennigate*, Amb. 67.

Filliter, 3 Ves. 7; *Bland* v. *Bland*, Pre. Ch. 201, in notes, Finch's ed.; Le *Maitre* v. *Bannister*, 26th November, 1770, stated in Mr. Finch's note to *Eales* v. *England*, Pre. Ch. 200; *Cunliffe* v. *Cunliffe*, Ambl. 686. See also *Civil* v. *Rich*, 1 Ch. Ca. 310, and see the observations of the Master of the Rolls (Lord Kenyon), in deciding *Pierson* v. *Garnett*, 2 Bro. Ch. Rep. 38; with respect to trusts by implication, see post ch. 5. and Roper on Legacies, 2 V. 304.

(*y*) This point does not appear to have been so determined in the case referred to; *Riddle* v. *Emerson*, 1 Vern. 108.

(*z*) The authorities cited in the margin are abundantly sufficient to show, that in this instance, a court of equity will not allow a man guilty of a fraud to protect himself from the consequences, by a statute professedly made to prevent fraud.

SECTION V.

ALSO the declaration of uses ought, 1st, To have a clear and apparent intent, and not to be upon general words, or words spoken in futuro (*a*) (for these are executory, and found only in covenant,) but spoken advisedly, and in præsenti, which is an immediate gift (1). The words must likewise be declaratory, and not obligatory; for then they have another effect (2). 2dly, The declaration must be certain; for else there would be no certainty of inheritances.

(1) *Callard* v. *Callard*, Cro. Eliz. 345.

(1) *Hore* v. *Dix*, Sid. 27. *Blitheman* v. *Blitheman*, Cro. Eliz. 279. Moor, 122. 3 Leon. 6. pl. 18. 1 And. 25. pl. 55. Bendl. 121. *Buckley* v. *Symonds*, Wynch, 60. 2 R. Ab. 788. pl. 1. *Englefield*'s case, Poph. 21. Gilb. Uses, 60.

(*a*) As that the land shall come, remain, and be in tail or in fee to A. which, being mere words of covenant, will not raise an use in A. *Buckley* v. *Simonds*, Wynch, 60. *Blytheman* v. *Blytheman*, Cro. Eliz. 279. Gilb. Uses, 60. 2 Roll's Ab. 788, 789. 3 Leo. 6. pl. 18. 1 And. 25. pl. 55. But though words spoken *in futuro* are not sufficient to raise an use in law; yet as it is an established rule in equity, that "whenever parties agree concerning any particular subject, such agreement as against the party himself, and any claiming under him, voluntarily, or with notice, is sufficient to raise a trust," (see *Legard* v. *Hodges*, 1 Ves. jun. 477.)

And this certainty ought to be principally in three things, viz. in persons to whom (3), in lands, &c. (4), of which, and in estates for which (5) the uses are transferred and declared. And if certainty is wanting in any of these (*b*), the declaration is not sufficient (6). 3dly, The declaration must be precedent or present, and perfect and complete, and not as a communication in reference to matter to be put into writing after. Yet a deed subsequent, may declare

(3) *Dowman's* case, 9 Rep. 9. a. Shepard's Touchstone, 520.

(4) *Lees* v. *Ld. Stafford*, 4 Leon. 58. *Cob.* v. *Betterson*, Cro. Jac. 374. Dyer. 87.

(5) *Stukely* v. *Butler*, Hob. 168. Shepard's Touchstone, 249, 250.

(6) *Kirsley* v. *Duck*, 2 Vern. 634. 2 And. 141, 142. Shep. Touchstone, 252.

(*b*) The uncertainty intended, is that which appears on the face of the deed, and not that which may arise from matter dehors the deed, as where there are two persons or two estates of the same name; for in such case, as the ambiguity or uncertainty *oritur de facto verificatione facti tollitur*; Ld. *Cheney's* case, 5 Rep. 68. Nor does the uncertainty here intended extend to those things which, though uncertain of themselves, may be reduced to a certainty, by means which the law appoints, or which the party himself has assigned. See *Stukely* v. *Butler*, Hob. 174. Shep. Touchstone, 250. Nor does it apply to that uncertainty which may be created by a subsequent and superfluous description, *nam utile per inutile non vitiatur*. *Dowtie's* case, 3 Rep. 10. *Trapp's* case, 3 Leon. 235. Dyer, 376. pl. 25. Hob. 171. See also *Ulrich* v. *Litchfield*, 2 Atk. 372. *Beaumont* v. *Fell*, 2 P. Wms. 141. *Thomas* v. *Thomas*, 6 Term Rep. 671. *Smith* v. *Coney*, 6 Ves. 42. *Wild* v. *Hobson*, 2 Ves. & B. 105.

the uses of recovery, &c. precedent (*c*); because, in judgment of law, it operates against the maker and his heirs (*d*), viz. by estoppel, since nothing appears to the contrary, that there was a certain and complete declaration of the uses at the time of the recovery (7), &c.

(7) *Dowman's* case, 9 Rep. 10. a. b. Dyer, 136. a. 2 Roll's Ab. 782.

(*c*) After the passing of the statute 27 H. VIII. c. 10, a doubt arose, whether a subsequent deed could declare the uses of a fine or recovery precedent. It was, however, determined in *Dowman*'s case, that the uses of a fine or recovery precedent might be declared by deed subsequent; and the law so continued until the statute 29 Car. II. c. 3, when the doubt recurred, whether the resulting use was not so executed by the fine or recovery in the conusor or recoveree, (no uses being previously declared), as to exclude any subsequent declaration. To obviate this doubt, the stat. 4 Ann. c. 16. § 15, enacts, That all declarations of uses, &c. after the levying of any fine, or suffering of a recovery, shall be as good and effectual in the law as if the act, 29 Car. II. c. 3, had not been made. That this provision extends to femes covert, see *Bushel* v. *Burland*, Holt. 733; but query the decision as to the legal policy that requires a fine to be levied by a feme covert of her real estate, as the subsequent declaration of the uses may be under the coercion, which the levying of the fine was intended to exclude.

(*d*) The declaration of the uses, by a deed subsequent to the fine or recovery, though it estops all persons parties to it, does not estop persons who are not. Gilb. Uses, 61. *Morley* v. *Jones*, 4 Mod. 261. Carth. 410. Show. P. C. 140.

SECTION VI.

And where the uses of a recovery are declared by deed precedent, no new or other uses can be averred by parol; for nothing vests till the recovery be had, and then the parol declaration shall not control the deed precedent, but all parties are estopped to aver the contrary. And in case of a deed precedent, if the party set up other uses, he must confess and avoid; for unumquodq; dissolvitur eo ligamine quo & ligatum est (1). 2dly, But if there be two deeds, the last shall stand, and not both; for it would be contrary to the intent of the parties to make an hotch-pot and commixtion of them, which, by their creation, were distinct and several, in time, persons, and estates (2). 3dly, This is intended where the fine or recovery is pursuant; for, if they vary, there is room and occasion given to inquire and receive information that the old agreement was relinquished. And by the same reason that the use of a fine might have been declared by parol (*e*) upon an original agree-

(1) *Countess of Rutland's* case, 5 Rep. 26. *Dowman's* case, 9 Rep. 10, b. *Tregame v. Fletcher*, 2 Salk. 676.

(2) *Countess of Rutland's* case, 5 Rep. 26, b.

(*e*) Since the statute of fraud, all declarations of uses or trusts must be in writing. Parol evidence is, how-

ment, it might also, where the original agreement was relinquished. Yet, without such averment, the fine shall be intended to the use of the said agreement, notwithstanding the variance (3). 4thly, But where they are by deed subsequent, new, or other uses may be averred, without shewing the deed, though there be no variance; because there was no intermediate time, when there might be such agreement made. And the uses rise by the recovery according to that agreement, and cannot be divested by any declaration by indenture subsequent; and if a deed subsequent be set up, the other may traverse those uses (4).

(3) *Jones* v. *Morley*, 2 Salk. 677. Holt's Rep. 321. *Stapilton* v. *Stapilton*, 1 Atk. 2.

(4) *Tregame* v. *Fletcher*, 3 Salk. 676.

ever, admissible to rebut a resulting use. *Roe* v. *Popham*, Dougl. 26. *Lord Altham* v. *Earl of Anglesey*, Gilb. Rep. 16. 2 Salk. 676. See also *Taylor* v. *Taylor*, 1 Atk. 386.

CHAP. III.

Of the Limitation of Uses by the Party.

SECTION I.

BUT although uses were, in their origin, no more than an equitable right to the land, and to be determined only in a court of equity, yet equity often followed the law (1), and especially in voluntary conveyances, or where there was no particular reason to favour one side rather than the other. There is a known and established difference therefore between the limitation and creation of uses. For in their creation (*a*) the intent of

(1) *Corbet's* case, 1 Rep. 88, a.

(*a*) The various necessities of mankind induced the judges to depart from the rigour and simplicity of the rules of the common law, and to allow a more minute and complex construction upon conveyances to uses, than upon others. Hence it was adjudged that the use need not always be executed the instant the conveyance is made; but if it cannot take effect at that time, the operation of the statute may wait till the use shall arise upon some future contingency, to happen within a reasonable period of time; and in the mean while, the ancient use shall remain in the grantor; as when lands

(2) Co. Litt. 49, a. 2 Inst. 672. *Coltman* v. *Senhouse*, T. Jones, Rep. 106. *Fox*'s case, 8 Rep. 93. *Makepeace* v. *Fletcher*, Com. Rep. 459. *Shelly*'s case, 1 Rep. 100. *Hore* v. *Dix*, Sid. 26.

the parties is chiefly to be regarded (2). And if the intent is manifest, though void,

are conveyed to the use of A. and B. after a marriage shall be had between them (2 Roll's Ab. 791.) *Woodliffe* v. *Drury*, Cro. Eliz. 439. *Samme*'s case, (13 Rep. 56, b.) Or to the use of A. and his heirs, till B. shall pay him a sum of money; and then to the use of B. and his heirs (Bro. Ab. tit. Feoffm. Ab. Uses, 30.) Which doctrine, when devises by will were again introduced and considered as equivalent in point of construction to declarations of uses, was also adopted in favour of executory devises. But herein those which are called contingent or springing uses, differ from an executory devise, as there must be a person seised to such uses at the time when the contingency happens, else they never can be executed by the statute; and therefore if the estate of the feoffee to such use be destroyed, by alienation, or otherwise, before the contingency arises, the use is destroyed for ever (*Chudleigh*'s case, 1 Rep. 134, 138.) Whereas, by an executory devise, the freehold itself is transferred to the future devisee. (See Fearne's Essay on Contingent Remainders and Executory Devises, 298, 3d ed.) And in both these cases a fee may be limited to take effect after a fee. (*Carpenter* v. *Smith*, Pollexf. 78. *Marks* v. *Marks*, 10 Mod. 423.) Because, though that was forbidden by the common law, in favour of the lord's escheat, yet when the legal estate was not extended beyond one fee simple, such subsequent uses (after a use in fee) were, before the statute, permitted to be limited in equity, and then the statute executed the legal estate in the same manner as the use before subsisted. It was also held, that

yet the conveyance shall never take effect any other way. As if uses are limited upon the estate intended to be transferred, or there be any other circumstance in the deed that shews he designed to pass it at common

a use, though executed, may change from one to another by circumstances *ex post facto;* as if a man make a feoffment to the use of his intended wife and her eldest son for their lives; upon the marriage, the wife takes the whole use in severalty, and upon the birth of a son, the use is executed jointly in them both. This is sometimes called a secondary, sometimes a shifting use. And whenever the use limited by the deed expires, or cannot vest, it returns back to him who raised it, after such expiration, or during such impossibility, and is styled a resulting use; as if a man make a feoffment to the use of his intended wife, with remainder to her first born in tail; here, till he marries, the use results back to himself. After marriage, it is executed in the wife for life; and if she die without issue, the whole results back to him in fee. (Bacon of Uses, 350.) It was likewise held, that the uses originally declared may be revoked at any future time, and new uses be declared of the land; provided the grantor reserved to himself such a power at the creation of the estate. Whereas the utmost that the common law would allow, was a deed of defeazance, coeval with the grant itself, and therefore esteemed a part of it, upon events specifically mentioned. And in case of such a revocation, the old uses were held instantly to cease, and the new ones to become executed in their stead. And this was permitted, partly to indulge the convenience, and partly the caprice of mankind, who, as lord Bacon observes (on

law (3); because the intent is the great director of uses, and no construction can be made against the intent apparent. Yet the precise technical words (4) of bargain and sale, or covenant to stand seised, are not required to raise an use (*b*): but any words

(3) 2 Roll's Ab. 787. pl. 3. Co. Lit. 49, a. *Samon* v. *Jones*, 2 Ventr. 318. Gilb. Uses, 49. *Daw* v. *Newborough*, Com. Rep. 242. *Key* v. *Gambie*, T. Jones, 123. But see 2 Wils. 22. 75. Com. Rep. 334.

(4) *Coltman* v. *Senhouse*, 2 Lev. 225. *Mudge* v. *Mudge*,

Uses, 316), "have always affected to have the disposition of their property revocable in their own time, and irrevocable ever afterwards." 2 Bla. Com. 334, 335. The above extract is sufficient to shew, that in the creation of estates by way of use, more indulgence is allowed to the intent of the parties, than in the creation of estates by conveyances at common law. See Sugden's note on Gilb. on Uses, 158.

(*b*) Conveyances by bargain and sale enrolled, which (money making no part of the consideration) could not operate by way of bargain and sale, have been allowed, in respect of the intent of the parties, to operate by way of covenant to stand seised, the consideration allowing of such construction. *Crossing* v. *Scudamore*, 2 Lev. 9. *Walker* v. *Hale*, 2 Lev. 213. *Osman* v. *Sheafe*, 3 Lev. 370. *Mudge* v. *Mudge*, Com. Rep. 334. *Thorne* v. *Thorne*, 1 Vern. 141. *Thompson* v. *Atfield*, 1 Vern, 40. So also a defective feoffment shall operate as a covenant to stand seised. *Habergham* v. *Vincent*, 2 Ves. jun. 226. And the rule laid down, Co. Litt. 49, a. and acted upon in the cases referred to in the margin (2), namely, That where the intent appears to pass the estate by a common law conveyance, if it cannot so pass the con-

sufficient to shew the intent, or that are tantamount, with good consideration, will do (c). And the Judges have more regard for the substance than the shadow and form, and will make a man's intent good in passing his estate, if by any lawful means it may take effect (5).

(5) *Shove* v. *Pincke*, 5 Term Rep. 124.

veyance shall not operate as a covenant to stand seised to uses, seems materially broken in upon by the judgment of C. B. in *Roe*, on demise of *Wilkinson*, v. *Tranmer*, 2 Wils. 75. *Doe*, on demise of *Milbourne*, v. *Assignees of Simpson*, 2 Wils. 22.

(c) It is a general rule in equity, that where there be a consideration, the imperfect execution of the contract shall not invalidate the equity raised by the agreement; but this rule does not extend to cases in which the contract is defectively executed in particulars prescribed by the legislature. See *Hibbert* v. *Rolleston*, 3 Bro. Ch. Rep. 571. *Williams* v. *D. of Bolton*, 2 Ves. jun. 138. *Ex parte Houghton*, 17 Ves. 251.

SECTION II.

BUT, as forms and technical words in conveyances are appointed by law for the general peace and quiet, the words of limitation of estates created by deed must be the same, by way of use, as in a feoffment (1), and in all common assurances (*d*);

(1) *Corbet's* case, 1 Rep. 88. *Carpenter* v. *Smith*, Pollexf. 79. *Neville* v. *Neville*, 1 Roll's Ab. 837. Gilb. Uses, 75. Sander's Uses, 168.

(*d*) Whether words of limitation are, in the construction of uses created by deed, to receive the strict technical exposition which they receive in the construction of common law conveyances, or the more liberal exposition which is allowed in the construction of wills, is a point upon which a difference of opinion appears to have prevailed. In *Corbet's* case, 1 Rep. 88, a. it is stated, that "before the statute of 27 H. VIII. the Chancellor, in the case of an use judged by the imitation of the rules of the common law, and according to the nature and quality of the land, as in case *de possessione fratris*, Borough-English; and so his judgment was by way of imitation. And the makers of all the statutes concerning uses, as 1 R. III. c. 5. 7 H. VII. c. 17. 9 H. VII. c. 16; and all other statutes have made uses to imitate and resemble estates in possession, and to be guided and directed according to the rules and reason of the common law. See also *Fitzwilliam's* case, 6 Rep. 34; *Lisle* v. *Gray*, Raym. 317;

and thus uses created by deed differ from a devise: for there, any words which shew the

Carpenter v. *Smith*, Pollexf. 79; and in *Atwaters* v. *Birt*, Cro. Eliz. 856, it was expressly held, that a feoffment to uses shall not be expounded as a will; and on that ground it was resolved, in *Neville* v. *Neville*, 1 Roll's Ab. 837, pl. 1, that a feoffment to the use of *A.* and his issue male of his body, conveys not an estate tail. See also Gilbert on Uses, 75. Sanders on Uses, 168. But in *Leigh* v. *Brace*, Carth. 343, the Court is reported to have stated, that a conveyance by way of use had always been construed like wills, with respect to the intention of the parties, and is not tied up to the strict form of conveyances at common law; and determined, that, from respect to the intent of the feoffor, a limitation by feoffment to the use of *T. B.* and his heirs for ever was cut down to an estate tail by the subsequent words, and for default of issue of the body of *T. B.* See also 1 Vent. 373. But *quære*, whether the construction of the above limitation would not have been the same in a common law conveyance? See 19 H. VI. c. 74, b. And if the construction would have been the same, it was unnecessary to resort to the doctrine maintained by the Court. It may be material also to remark, that the rule laid down in *Leigh* v. *Brace* was not followed in *Makepiece* v. *Fletcher*, Com. Rep. 457. In *Rigden* v. *Valliere*, 2 Ves. 257. 3 Atk. 731, Lord Hardwicke having stated the general objection, that it would create confusion and uncertainty, if deeds to uses were to receive, as to their *limitations*, a construction different from that which would be given to feoffments or other conveyances at common law; for the statute joining the estate and the use together, it becomes one entire conveyance, by force of the statute, and the words are to be

intent are sufficient, if it could be made good by any conveyance in his life-time;

construed in the same way; but this is to be taken with some restrictions. As to the words of limitation in a deed, see *Barker* v. *Giles*, Sel. Ca. Ch. 19. *Denn* v. *Gaskin*, Cowp. 660; they are, to be sure, to be construed in that manner, *viz.* in the same sense; but where they are words of regulation or modification of the estate, as the words equally to be divided are, and not words of limitation, I think there is no harm in giving them greater latitude in deeds on the statute of uses, which are "trusts at common law, than on feoffments, which are strict conveyances at common law." This distinction appears to have been recognized in *Goodtitle* v. *Stokes*, 1 Wils. 341. But in the case of *Stratton* v. *Best*, 2 Bro. Ch. Rep. 233, upon its being very forcibly urged, Lord Thurlow, Chan. stating the question to be, "Whether deeds to uses, in the nature of wills, should be construed as widely as wills have been?" observed, that "he should be sorry to give into this, for he thought that no good had been done by the wide construction of wills." See also Mr. Booth's opinion, published in a collection of Cases and Opinions, page 279. With respect to the limitation of uses of copyhold estates, it was held, in *Fisher* v. *Wig*, 1 P. Wms. 14, 1 L. Raym. 622, by two justices against Holt, C. J. that a surrender of a copyhold to uses is not to be construed with the same strictness as a common law conveyance; and though the authority of this decision appears to have been very much shaken by the determination in *Idle* v. *Cook*, 1 P. Wms. 70, yet it has, in later cases, been recognized, as affording a sound distinction. See *Rigden* v. *Valliere*, 2 Ves. 257; *Goodtitle* v. *Stokes*, 1 Wils. 341. But see *Seagood* v. *Hone*, Cro. Car. 366. And in support

because the law intends the devisor to be inops consilii, wills being usually made in extremis. So that any words which shew the intent, that the devisee should have the land for ever (*e*), will make a fee-simple,

of the decision, it is observable, that as copyholds are not within the statute of uses, *Rowden* v. *Malster*, Cro. Car. 44, the limitations of a surrender must remain as before the statute: and if the ancient construction of limitations of a use of a freehold estate be in any degree affected by the statute of uses, the construction of limitations of copyholds remaining the same, must be referred to copyholds not being within the statute, which has varied the construction of limitations of freehold. That the limitations of a trust executed, (as contra-distinguished from trusts executory) are to be construed by the same rules which govern the construction of limitations in a similar instrument, immediately including or carrying the legal estate, (whatever doubts formerly prevailed) seems to be now a point clearly and incontrovertibly established; See *Jones* v. *Morgan*, 1 Bro. Ch. Rep. 222, where the cases upon this point are very elaborately considered. But in the construction of mere articles or trusts purely executory, words of limitation are very properly allowed to receive a more liberal and indulgent construction. See B. I. c. 6. § 8. note (*q*).

(*e*) The intent of the devisor, if plain and manifest, will certainly be sufficient to supply the want of those words which are necessary in deeds to convey an inheritance; but in all such cases the intent must be manifest, and the implication absolutely necessary;

without the word heirs, as in perpetuum, or paying where the payment is of a sum in gross, and he may not be able to pay it out of the profits (2). So where he has power to give a fee, he is construed to have one, unless he has an express estate divided from the power (3). And in general, wherever lands are devised for a special purpose, or for payment of debts, or the like (4), without any words of limitation, he shall have an estate in fee to answer that purpose, by implication of law (*f*). So where *A.* hav-

(2) Co. Lit. 9. b. Gilb. Dev. 19.

(3) *Thomlinson* v. *Dighton*, 1 Salk. 240. 1 Buls. 222. 1 Roll's Ab. 834.

(4) *North* v. *Compton*, 1 Ch. Ca. 196. *Tibbots* v. *Hurst*, 1 Ch. Rep. 108. *Collier's* case, 6 Rep. 16, a. *Ackland* v. *Ackland*, 2 Vern. 687. *Doe* v. *Woodhouse*, 4 T. Rep. 89. *Kerman* v. *Johnson*, Style's Rep. 281. 1 Roll's Ab. 834. pl. 14. *Anon.* 9 Mod. 92.

for the heir at law shall never be disinherited by a conjectural or possible implication; *Gardner* v. *Shelden*, Vaugh. 259; *Bowes* v. *Blackett*, Cowp. 235. Therefore, though a devise to *A.* and his assigns *in perpetuum*, be sufficient to carry the fee, from the evidence it affords of the intent of the devisor, yet a devise to *A.* and his assigns, without annexing words of perpetuity, will pass only an estate for life, a larger estate not being necessary to the operation of such devise; Co. Lit. 9, b. As to what words will carry the fee, and what not, see Gilb. Dev. 19. 3 Com. Dig. Devise, N. 4. See 3 Bridgeman's digested Index, "*Words.*" As to what will pass the reversion, see 2 Ves. 51; *Gretton* v. *Haward*, Rolls. July 1816. In what cases a fee will pass by deed, without the word heirs, see 2 Bla. Com. 108, 109,

(*f*) Where an estate is devised to *A.* without words

ing only a remainder in fee, after an estate tail to *B.* devises all the house called the

of inheritance, subject to the payment of a sum in gross, *A.* shall take a fee, because he is to pay the money in all events, and he may die before he repays himself out of the estate; in which event he would be a loser by the devise, if he were not to have the fee. *Collier's* case, 6 Rep. 16, a. 1 And. 38. pl. 100. 2 Mod. 25. *Freak* v. *Lee*, 2 Lev. 249. *Wellock* v. *Hammond*, Cro. Eliz. 204. *Salmon* v. *Denham*, Com. Rep. 323. Yet even in such a case, *A.* shall not have the fee, if a contrary intention manifestly appear. *Bacon* v. *Hall*, Cro. Eliz. 497. But where the payment of a certain sum is directed to be made annually, or otherwise, out of the rents and profits, the devisee shall in general take but an estate for life; for though he takes the land charged, yet he is to pay no faster than he receives, and therefore cannot be a loser. *Collier's* case, 6 Rep. 16. Bendloe's Rep. 15. *Ansley* v. *Chapman*, Cro. Car. 157. *Shailard* v. *Baker*, Cro. Eliz. 744. *Spicer* v. *Spicer*, Cro. Jac. 527. *Baddely* v. *Leppingwell*, 3 Burr. 1533. *Bowes* v. *Blackett*, Cowp. 235. 8 Vin. Ab. Devise, (S. C.) 1 Eq. Ca. Ab. 177. But though the circumstances of the charge, being directed to be paid out of the rents and profits, is in general sufficient to restrain a devise without words of inheritance, to a mere estate for life; yet if there are circumstances whence it can be collected that the devisor intended the devisee to take a larger estate, such circumstances will be allowed to prevail. *Webb* v. *Herring*, Cro. Jac. 415. *Frogmorton* v. *Hollyday*, 4 Burr. 1618. *Doe* v. *Woodhouse*, 4 T. Rep. 89. See also *Lee* v. *Withers*, T. Jones, 107. It may here be material to observe, that though where

Bell-Tavern to *C.* without saying for what estate the fee passes, otherwise *C.* should have nothing (5). And, although in a deed (*g*) an implication is never admit-

(5) *Cole* v. *Rawlinson*, 1 Salk. 234. Moore, 873.

the devise be general, the circumstances of a charge of a gross sum will by implication give the devisee an estate in fee, "from the certainty, that the devisor must mean a bounty and benefit to his devisee; yet there is no instance of such implication, where an estate for life, or an estate tail, is expressly given." *Doe* v. *Fyldes*, Cowp. 841. *Slater* v. *Slater*, 5 Term. Rep. 335. See also *King* v. *Melling*, 1 Vent. 227. Nor will the circumstance of the charge being in such case payable to *A.* and his heirs, enlarge an estate devised for life, or in tail: but the charge in fee shall issue out of the whole estate, and not out of the particular estate only; and being governed by the directions of the will, it shall take effect according to the limitations thereof, and charge the whole of the inheritance. *Dutton* v. *Ingram*, Cro. Jac. 427.

(*g*) The authorities referred to in the margin (6) distinctly support this doctrine. It seems, however, to be materially affected by the case stated by Perkins, § 173, which is an instance of an estate tail arising by implication, even in a deed; and the authority of this case was recognized by Holt, C. J. in *Idle* v. *Cook*, 1 P. Wms. 78: and by Powel, J. in *Bamfield* v. *Popham* 1 P. Wms. 57. It may also merit consideration, whether supposing the doctrine to hold as to freehold, it extends to copyhold estates, Cro. C. 36. Brownl. 127. Co. Copyhold, 97; it having been held, that a deed declaring the uses of a copyhold estate, is

ted (6), neither shall there be cross remainders upon construction of it (7), yet in a will it is otherwise (8); but there must be an express intent to be collected out of the words, or a necessary implication (*h*) or

(6) *Seagood* v. *Hone*, Cro. Car. 366. *Pybus* v. *Mitford*, 1 Ventr. 376, 379. Vaugh. 261. *Davis* v. *Speed*, 4 Mod. 153.

(7) *Cole* v. *Livingstone*, 1 Ventr. 224. (8) *Horton* v. *Horton*, Cro. Jac. 75. *Fawkner* v. *Fawkner*, 1 Vern. 21, 22. *City of London* v. *Garway*, 2 Vern. 571. *Gilbert* v. *Witty*, Cro. Jac. 655. *Holmes* v. *Meynell*, T. Jones, 172. *Wright* v. *Holford*, Cowp. 31. *Phipard* v. *Mansfield*, Cowp. 797. See B. 1. c. 6. s. 19. *Comber* v. *Hill*, Stra. 969.

not to be construed with the same strictness as a common law conveyance, but like a will. *Fisher* v. *Wigg*, 1 P. Wms. 14. *Rigden* v. *Valliere*, 2 Ves. 257. whence it should follow, that it allows of such implications as are permitted in the construction of a will. But see *Idle* v. *Cook*, 1 P. Wms. 70, and Mr. Cox's note to *Fisher* v. *Wigg*, 1 P. Wms. 14. With respect to resulting uses in a deed, though frequently treated as estates arising by implication, they cannot, with strict propriety, be so considered, such estates being part of the ancient use not disposed of, and not a new estate created by implication of law. See 1 Ventr. 379.

(*h*) Although I have already had occasion to refer to some of the instances in which implication is allowed to prevail in the construction of a will, it will, I trust, not be deemed an unnecessary addition to consider the doctrine somewhat more particularly.

In the construction of a will, an estate may arise, be enlarged, controlled, and even destroyed by implication. 1st, An estate in freehold may arise by implication; as where an estate is limited to the heir of the devisor

else the heir shall not be disinherited, for his title is clear, and not to be doubted of (9).

(9) *Gardner* v. *Sheldon*, Vaugh. 263. *Spirt* v. *Bence*, Cro. Car. 369. 1 Freem. 74. *Doe* v. *Holmes*, 2 Wils. 30. *Bowes* v. *Blacket*, Cowp. 235.

after the death of the wife of the devisor; for the intent of the devisor is clearly to postpone the heir till after her death; and if she does not take it, nobody else can. *Horton* v. *Horton*, Cro. Jac. 75. 1 Ventr. 376. So if the devise over be to one of two or more coheiresses; *Hutton* v. *Simpson*, 2 Vern. 723. *Willis* v. *Lucas*, 1 P. Wms. 472. So if a term be bequeathed to the executors after death of testator's wife, she shall have it for life by implication. *Horton* v. *Horton*. As to copyhold, see Co. Copy. 97. Cro. C. 360. Brownl. 127. As to personal, see post, c. 3. s. 4. 2d, An estate may be enlarged by implication; as where an estate is devised to *A.* generally, and, for want of issue, the remainder over to *B.*; *A.* shall take an estate tail by implication. For though the devise to *A.* generally would of itself pass only an estate for life, yet as no benefit is given to *B.* while there is any issue of *A.* the consequence would be, that as no interest springs to *B.* and no express estate is given to the issue of *A.* after the death of *A.* the intermediate interest would be undisposed of, unless *A.* were considered as taking for the benefit of his issue, as well as of himself; and as the words are capable of such amplification, the court naturally implies an intention in the testator that *A.* should so take, that the property might be transmissible through him to his issue; and he is therefore considered to take an estate tail, which will descend on his issue; per Lord Thurlow, C. *Knight* v. *Ellis*, 2 Bro. Ch. Rep. 578. As to a bequest of a chattel or personalty, by

such words, see Fearne's Essay on Exec. Dev. 363; where the diversity taken in some cases between a limitation of a term, by such words, as in the case of real estate, would give an express estate tail; and a limitation of the same, by such words as in the case of a real estate, would only give an estate tail by implication, is very fully considered, and said to be overturned. But though it be agreed, that an estate devised generally may, by implication, be so enlarged, yet it has been said, that an estate expressly given for life cannot be enlarged to an estate tail, nam expressum facit cessare tacitum. *Bamfield* v. *Popham*, 1 P. Wms. 54. *Luddington* v. *Kime*, 1 Ld. Raym. 204. See *Ginger* v. *White*, Willes Rep. 355. It is certainly generally true, that an estate expressly and distinctly defined by the testator shall not be enlarged by implication; but, if the manifest general intent of the testator require it, courts of justice will, in order to effectuate such general intent, disregard the particular intent, however expressly declared, if inconsistent with the general intent. *Robinson* v. *Robinson*, 1 Burr. 44, and the cases there cited. *Doe* v. *Applyn*, 4 Term Rep. 82. *Doe* v. *Halley* 8 T. Rep. *Doe* v. *Smith*, 7 T. Rep. 531. *Doe* d. *Cock* v. *Cooper*, 1 East's Rep. 229; 5 East, 548. *Doe* v. *Goff*, 11 East, 668. *Wight* v. *Leigh*, 15 Ves. 565. *Gretton* v. *Haward*, 4 Taunt. 94, and see *Stanley* v. *Lennard*, 2 Eden's R. 98, note. The question, therefore, in all such cases, is, Whether the manifest general intent can receive effect, without enlarging the estate of the devisee for life? If the testator appear to have intended to extend his bounty to the issue of the devisee for life, and by making the remainder over dependent on the want of issue of the devisee for life (such most probably was his intention), how can such intent receive effect, unless the devisee take an estate descendible to his issue? for it seems clear that the issue could

not take as purchasers by implication. See *Lady Lanesborough* v. *Fox*, Forrest. 262. *Bodens* v. *Watson*, Ambl. 478. See Cro. Eliz. 16, and Fearne's Essay, Ex. Dev. 325. But if the issue cannot take as purchasers, they can only take by the estates being transmissible, for which purpose the ancestor must take a descendible estate, and in thus making the particular intent give way to the manifest general intent, courts of justice do no more than the testator himself would probably have done, had he been apprized that his general purpose required him to give up his particular intent. But, in collecting the general purpose of the testator, the particular intent is always regarded; and if one can receive effect without prejudice to the other, it is certainly the duty of courts of justice to allow it to prevail: and, to such consideration, the decision of *Bamfield* v. *Popham*, is referred by Lord Hardwicke, in *Allanson* v. *Clitherow*, 1 Ves. 26; his Lordship conceiving the case not to have required that the express estate for life should be enlarged to an estate in tail male, in order to effectuate the testator's intention as to the male issue of the devisee for life, there being an express limitation in tail male to the devisee's first and other sons. The circumstance of the testator's having limited an estate in tail male to the first and other sons of the devisee for life, might, in the event which had happened, render it unnecessary to enlarge the estate of the devisee for life; but the construction of a will is not to vary with the events. Suppose, therefore, that the eldest son of the devisee had died in the lifetime of the testator, the devise to him would have lapsed, and his issue male would consequently have been excluded from taking under the will. *White* v. *White*, 1 Bro. Ch. Rep. 219. See *Ambrose* v. *Hodgson*, Dougl. 340. *Denn* v. *Bagshaw*, 6 Term Rep. 512. But the limitation over was not to take effect while there

was issue of the devisee for life; an intention which, with reference to the above possibility, could only receive effect by enlarging the estate of the devisee for life. The case of *Bamfield* v. *Popham* must, therefore, as it seems to me, be allowed to be a decision against the general intent, in order to effectuate the particular. With respect to the authorities referred to by Mr. J. Powell, in the case of *Luddington* v. *Kime*, I shall have occasion to consider them as instances which restrain the enlargement of estates by implication, but which are not, at least direct, authorities against the proposition for which I am now contending, namely, that an estate, though expressly devised for life, may by implication be enlarged to an estate tail; in support of which, see *Langley* v. *Baldwin*, as stated by Lord C. Hardwicke, in *Allanson* v. *Clitherow*, 1 Ves. 26; and *Robinson* v. *Robinson*, 1 Burr. 44. But, though an estate expressly limited for life may, in order to effectuate the implied intent of the testator, in favour of the issue of the devisee for life, be enlarged to an estate tail, it remains to consider, whether it can be enlarged, if the testator has not only limited the estate expressly for life, but superadded negative words, restrictive of the devisee taking a larger estate, as no longer, only, non aliter.—Wedgwood's case, *Backhouse* v. *Wells*, *Cross* v. *Wadhold*, are frequently referred to as authorities against the enlargement of an estate for life, if negative words restrictive of a larger estate be superadded. Lord Hale, in his judgment in *King* v. *Melling*, 1 Vent. 231. does certainly recognize *Wedgwood*'s case, H. 13 Car. II. which was a demise to *A.* for life, and non aliter, and after his decease to the sons of his body; in which case *A.* was held to take only an estate for life; and according to Lord Hale, by reason of the words non aliter. The case is very shortly stated, but from such statement, it seems difficult to apply it as an authority to shew that the

particular intent shall, in respect of negative and restrictive words, control the manifest general intent, for according to the reasoning of Lord Hardwicke, 1 Ves. 26. it does not appear that the general intent required that the estate for life should be enlarged. The only question in the case probably was, Whether such a limitation did not, by the positive rules of law, without resorting to the doctrine of implication, amount to an estate tail? and, if it did not by force of some fundamental rule of law amount to an estate tail, it seems to have been wholly unnecessary so to construe it, for the purpose of effectuating the testator's intent; there being an express limitation to the sons of the devisee for life, by which they might have taken as purchasers. See *Pierson* v. *Vickers*, 5 East's Rep. 548. *Backhouse* v. *Wells*, 10 Mod. 181, was a devise to J. S. to have and to hold for the term of his natural life *only*, without impeachment of waste, then to the issue male of his body, remainder to the heirs male of the body of that issue; J. S. was held to take only an estate for life. This decision is frequently referred to the force of the word only; (see 1 Eden's R. 432.) but, whatever might be the true ground upon which the decision proceeded, it does not appear in any degree to affect the general rule which I have already stated; namely, that the manifest general intent shall control the particular intent, however expressly declared; for the general intent was provided for by the limitation to the issue, and the particular intent was consistent with it: The doubt therefore was not, whether the particular intent was consistent with the general, but whether the particular intent was consistent with the established rules of law; and that it was allowed to prevail, must be referred to the limitation being to the issue male, and not to the heirs male: the word issue being sometimes a word of purchase, and sometimes of limitation, but the word heir being always

a word of limitation. If therefore the limitation over had been to the heirs male, instead of the issue male of the devisee for life, the operation of law would have been too strong for the intention, notwithstanding the restrictive and negative words used to declare it. See *Shaw* v. *Way*, 8 Mod. 253. *Legate* v. *Sewell*, 1 P. Wms. 87. The next case referred to against the enlargement of an estate expressly limited for life, with negative words restrictive of the devisee taking a large estate, is *Goodtitle*, ex dem. *Cross* v. *Wadhold*, M. 19 G. II. C. B. cited in *Robinson* v. *Robinson*, 1 Burr. 45, which was a devise to the testator's eldest son *only* for life, and, in case of failure of issue, the estate to descend and come to his the testator's male children, the testator's eldest son was held to take only an estate for life, because, being expressed to be given for life only, with negative words, it could not be enlarged by implication; and Lord Hale's opinion, in the case of *King* v. *Melling*, and the determination in *Backhouse* v. *Wells*, are said to have been relied on by the Court of Common Pleas. Having already considered how far the cases referred to by Lord Hale, and the decision in *Backhouse* v. *Wells*, break in upon the general rule, that the particular intent shall, if inconsistent with, give way to the general intent: and having, I trust, shewn that there was no occasion in either of those cases to control the particular, in order to effectuate the general intent, I cannot but be surprised that a case so immediately within the rule, as the case of *Cross* v. *Wadhold*, should have been decided upon the authority of cases so distinguishable from it. The case of *Cross* v. *Wadhold*, so far as it is stated, affords clear and direct evidence of the testator's intent as to these points: 1st, That his eldest son should have only an estate for life; 2dly, That the limitations to his the testator's male children should not take effect until failure of issue of such eldest son; and 3dly, I submit, That it affords a fair inference that the testator also

intended the issue of such eldest son to take after the death of such eldest son. To give effect to the words restrictive of the son's taking a larger estate, it was held he took only an estate for life. It may be material to consider how such construction bore upon the rest of the will. If the issue can be presumed to have been objects of the testator's bounty, could they take any benefit under his will, consistently with such construction, that the son took only an estate for life? if they could, it must be by allowing them to take as purchasers; but there was no estate expressly limited to them, and, as already observed, an estate is never implied to issue as purchasers. *Lady Lanesborough* v. *Fox*, Forrest. 262. *Bodens* v. *Watson*, Ambl. 478. The son therefore by the decision taking only an estate for life, the presumed intent of the testator as to the issue was necessarily disappointed, as they could not take through him, he not taking a descendible estate, nor as purchasers, there being no estate expressly limited to them. But further, the testator's male children are not to take until failure of issue of the eldest son, how can this intent receive effect if the issue are excluded from taking as purchasers, and the eldest son has only an estate for life? Can it receive effect as a contingent remainder? certainly not, for it will not necessarily vest at the determination of the particular estate. Can it be supported as an executory devise? certainly not; for it is limited after an estate of freehold, and is besides too remote, as the eldest son's issue might continue beyond a life or lives in being, and twenty-one or more years afterwards. Thus it appears, that by too strict a regard to the particular intent of the testator, not only the presumed general intent in favour of the issue, was disappointed, but also the declared intent in favour of his other male children. I have now submitted the several observations which occur to me on the cases which are thought to break in upon the general rule that the particular

intent, however expressly declared, shall give way to the manifest general intent, and shall conclude this discussion by referring to *Robinson* v. *Robinson*, 1 Burr. Rep. 38. and *Denn* v. *Bagshaw*, 6 Term Rep. 512, where the cases are collected and considered. As to estates arising by implication in respect of a charge, see B. 2. c. 3. s. 2. note (*p*). As to distinction between conveyances operating by transmutation of possession, and conveyances that do not so operate, with reference to raising estates by implication, see *Adams* v. *Savage*, 2 L. Raym. 854, and *Wills* v. *Palmer*, 5 Burr. 2615. Sugd. Gilb. Uses, 35.

2dly, With respect to the enlarging of estates, by allowing of cross remainders by implication, the cases referred to in the margin (8) are distinct authorities in support of such doctrine, subject, however, to the exception hereafter mentioned. It may also be material to observe, that though cross remainders are favoured in the construction of a will as between two, they shall not be favoured between more than two, *Phipard* v. *Mansfield*, Cowp. 800. *Perry* v. *White*, Cowp. 780. *Wright* v. *Holford*, Cowp. 31, and cases there cited.

3dly, An express devise may also be controlled by implication, as where the devise is to *A.* and his heirs, and if he die without heirs, then to one who is or may be the devisee's heir at law, the devisee shall take only an estate tail, though the limitation be in fee; for it is impossible that the devisee should die without heir while the remainder-man, or his issue, continue, and therefore the first limitation to his heirs shall be restrained in favour of the intent of the devisor. *Webb* v. *Herring*, Cro. Jac. 415. *Chaddock* v. *Cowley*, Cro. Jac. 695. *Hearne* v. *Allen*, Cro. Car. 57. *Brice* v. *Smith*, Com. Rep. 539. *Nottingham* v. *Jennings*, 1 P. Wms. 23.

Tyte v. *Willes*, Forrest. 1. *Tilburgh* v. *Barbut*, 2 Ves. 89. *Pickering* v. *Towers*, Ambl. 363. 1 Eden's R. 144. *Brice* v. *Smith*, 1 Willes R. 1. But quere, Whether the same construction would not prevail in a deed? (see T. 19 H. VI. 74. b.) See *Leigh* v. *Brace*, 5 Mod. 268, *Canon*'s case, 3 Leon. 5.

4thly, An estate devised may be revoked or destroyed by implication, as if the devisor do some act inconsistent with the operation of the devise; as where having devised in fee he grant the devisee a lease of the same land to commence after his, the devisor's death. *Coke* v. *Bullock*, Cro. J. 49, or mortgage the lands devised in fee to the devisee; *Harkness* v. *Bayley*, Pre. Ch. 514; but see *Baxter* v. *Dyer*, 5 Ves. 656. and *Peach* v. *Philips*, there cited; or do any act inconsistent with the operation of the devise. So also a change in the situation of the devisor will amount to a presumptive revocation of a devise of lands; as if a man having by his will devised the whole of his real estate, afterwards marry and have a child, this will operate as a presumptive revocation of his will; *Spragge* v. *Stone*, Ambl. 721, and *Christopher* v. *Christopher*, there cited; *Jackson* v. *Hurlock*, Ambl. 487. *Parsons* v. *Lanoe* Ambl. 537. *Wellington* v. *Wellington*, 4 Burr. 2165. So though the child be a posthumous child; *Doe*, dem. *Lancashire*, v. *Lancashire*, 5 Term Rep. 49; but in such case the presumption may, as in other cases of mere presumption, be rebutted by evidence; *Brady* v. *Cubit*, Dougl. 31; and quere, If all the above mentioned circumstances, namely, a prior disposition of the whole real estate, marriage, and the birth of a child must not concur in order to raise the presumption? See B. 4. p. 1. c. 2. s. 4. note (*b*). As to revocations implied by operation of law, where the intent of the devisor does not appear to have required it, see *Lord Lincoln*'s case, Show. P. C. 154.

Cave v. *Holford*, 2 Ves. J. 604, 3 Ves. 650, 4 Ves. 850. *Lord Carrington* v. *Payne*, 5 Ves. 404.

Having considered the cases in which estates may be raised, enlarged, controlled, or destroyed by implication, I shall now endeavour to bring together the leading cases in which the doctrine of implication has not been allowed to prevail, for the purpose of raising an estate, or enlarging, controlling or destroying an estate devised.

1st, If an estate be devised to a stranger after the death of testator's wife, she shall not have it by implication. See *Higham* v. *Baker*, Cro. Eliz. 16. *Horton* v. *Horton*, Cro. J. 75.

If an estate be devised to *A.* and the heirs male of his body, and if he die without issue of his body, remainder over; *A.* dies without issue male, having issue *female:* no estate will arise to such issue female by implication. *Higham* v. *Baker*, Cro. Eliz. 16. Moor, 124. *Lady Lanesborough* v. *Fox*, Forest. 262. *Bodens* v. *Watson*, Ambl. 478.

2d, When the devisee takes a particular estate of inheritance by express words in the will, such estate shall not be enlarged by implication. *Turke* v. *Frenchman*, Dyer, 171. When express and distinct estates are limited to two or more, and their several and respective issues, and for want of such issue, over, cross remainders shall not be implied, the words several and respective being sufficient to sever the titles. *Davenport* v. *Oldis*, 1 Atk. 579. *Clatche*'s case, Dyer, 330. *Perry* v. *White*, Cowp. 777. *Phipard* v. *Mansfield*, Cowp. 800. *Green* v. *Stephens*, Ves. 12. 419.

An estate expressly devised for life, shall not be enlarged by implication, in respect of the devisee's having the power to appoint generally in fee, 4 Leon. 41. *Tomlinson* v. *Dighton*, 1 Salk. 240. a fortiori, such an estate will not be enlarged by a limited power to appoint. *Leife* v. *Saltingstone*, 1 Mod. 189. 1 Salk. 240.

An estate expressly devised for life, or in tail, shall not, as already observed, be enlarged: in respect of the devisee's being charged with the payment of a sum in gross, see note (*f*), B. 2. c. 3. s. 2.

3d, An estate devised to *A.* and his heirs, shall not be controlled and cut down to an estate tail in respect of the words "and if he die without heirs, remainder to *B.*" if *B.* is a stranger who cannot be heir to *A.* See *Tyte* v. *Willes*, Forrest. 1.

4th, An estate devised shall not by implication be revoked or destroyed by any charge consistent with the operation of such devise. *Thorne* v. *Thorne*, 1 Vern. 182. *Hale* v. *Dunch*, 4 Vern. 329. 1 Vern. 342. Nor by any change in the situation of the devisor, as marriage and the birth of a child, if the testator has not disposed of the whole of his estate. See *Brady* v. *Cubit*, Dougl. 31.

It is perhaps scarcely necessary to observe, that these observations are confined to devises of real estate; in their principle they indeed extend to chattels and personal estates, but from the different nature of the subject, they are, in a few instances which will be noticed, differently affected by its application.

SECTION III.

So if the intent of the testator may be collected out of his will, that he designed an estate tail, though the word (body), which properly (*i*) creates an estate tail, is left out

(*i*) As the word heirs is generally necessary to create a fee, so the word body, or some other words of procreation, are necessary in a deed or common law conveyance, to create a fee tail; but if there be both words of inheritance, and of procreation, ascertaining the body out of which heirs shall issue, the word body, though most properly descriptive of an estate tail, is not required even in a deed; for "the example that the St. of Wm. II. putteth, hath not these words de corpore, but words hæredibus, *viz.* cum aliquis dat terram suam alicui viro & ejus uxori, & hæredibus deipsis viro & muliere procreatis." If lands be given to *B.* & hæredibus quos idem *B.* de prima uxore suâ legitime procrearet, this is a good estate in special tail, albeit he hath no wife at that time, without the words de corpore; so it is if lands be given to a man, and to his heirs which he shall beget of his wife, or to a man et hæredibus de carne suâ, or to a man, et hæredibus de se. In all these cases these be good estates tail, and yet the words de corpore are omitted. Co. Lit. 20. *b.* But though words of procreation be necessary to create an estate tail in conveyances at common law, yet the intent of the testator, if plain and manifest, will supply them in a devise. Co. Lit. 9, *b.* 27, *a.* and even an estate limited in fee, as

yet it is an estate tail (1). As if lands are devised to one, and if he dies before issue (*k*), or not leaving issue (2), or not having a son (3), all these limitations create an estate tail. And the meaning of the testator is to be spelt out by little hints (4), and no word to be rejected (*l*) which may possibly be made to stand (5); and therefore a devise to a man and the heir of his body, though in the singular number, is

(1) *Beresford's* case, 7 Rep. 41. *King* v. *Melling*, 1 Ventr. 228, 229, 231. 1. Roll's Ab. 835. pl. 3. 837. Co. Lit. 9, 27. 3 Mod. 143. 3 Lev. 70.

(2) *Newton* v. *Bernardine*, Moor, 127. *Sonday's* case, 9 Rep. 128. *Cozen's* case, Owen, 29. *Pinbury* v. *Elkin*, 2 Vern. 766. 1 P. Wms. 563.

(3) *Byfield's* case, cited by Lord Hale in *King* v. *Melling*, 1 Ventris, 231.

(4) Per Lord Hale, 1 Ventr. 230.

(5) *Blamford* v. *Blamford*, 3 Buls. 103. *Barker* v. *Giles*, 2 P. Wms. 201. *Hawes* v. *Hawes*, 3 Atk. 524. 1 Ves. 14.

to *A.* and his heirs, may be, as already observed, controlled and cut down to an estate tail, if the limitation over for want of an heir be to one who might be the heir of *A.* See the cases referred to, p. 66.

(*k*) The word issue, in a will, is either a word of purchase or of limitation, as will best answer the intention of the testator, though in the case of a deed it is universally taken as a word of purchase; *Roe* v. *Collis*, 4 Term Rep. 299.

(*l*) If the words be so inconsistent that they cannot possibly stand or be reconciled, those words shall be rejected which are least consistent with the general intention of the testator. *Hawes* v. *Hawes*, 3 Atk. 524. 1 Ves. 14. *Perkins* v. *Bayntun*, 1 Bro. Ch. Rep. 118. *Doe* v. *Aplyn*, 4 Term Rep. 88. see note (*e*) B. 2. c. 3. s. 2.

an estate tail (*m*). For heir is nomen operativum & collectivum (*n*), and chiefly in a will, shall be taken in its full extent, and then it reaches the most remote heir of the body (6). So also a devise to a man, and the children or issue of his body, is an estate tail (7), if he had none at the time to take jointly with him (*o*).

(6) *Clark* v. *Day*, Cro. Eliz. 313. 1 Buls. 221. 1 Roll's Ab. 836. *Burley*'s case, cited 1 Ventr. 230. *Richards* v. *Ld. Bergavenny*, 2 Vern. 324. *Millar* v. *Seagrove*, Robinson's Gavelkind, 96. *Trollop* v. *Trollop*, Ambl. 453. (7) Fearne's Con. Rem. 140. *Wild*'s case, 6 Rep. 17.

(*m*) Unless there be words of inheritance superadded so as to bring the devise within the reason of *Archer*'s case. See Fearne's Cont. Rem. 140. 3d ed.

(*n*) The word issue is also nomen collectivum, and takes in all issues to the utmost extent of the family equally with the word heirs of the body. Per Jus. Rainsford, *Warman* v. *Seaman*, Finch's Rep. 282.

(*o*) It appears to have been formerly held, that a devise to one and his issue would give a joint estate to the ancestor and his issue, if he had issue living at the time; but as Lord Hardwicke observed, that determination was before it was fully settled, that the word issue was as proper a word of limitation as heirs of the body." *Lamply* v. *Blower*, 3 Atk. 397.

SECTION IV.

AND whensoever the ancestor by any gift or conveyance takes an estate for life, and after in the same gift or conveyance a limitation is made to his heirs, in fee or in tail, the heirs shall not be purchasers (*p*); and

(*p*) This rule, which in substance is to be found in numberless cases, is from its being more particularly and formally drawn out and stated in *Shelly*'s case, generally described as the rule in *Shelly*'s case. It might reasonably be expected, that a rule of so great antiquity, and of so frequent and important application, had been long since defined with too much precision, to allow of any difference of opinion amongst the learned in the profession, as to its nature and extent. Its existence is admitted, and so far as respects limitations of legal estates in conveyances by deed, its prescriptive claim to control seems established; nor is there any difference of opinion as to its giving way to more prevalent principles of construction in marriage articles, but its authoritative controlling force in the construction of wills has led to a controversy, in which we find the most profound abilities anxiously and strenuously opposed. It would lead much beyond the province of a note, to state even the substance of the several decisions and opinions with which the profession have been favoured upon this very interesting point; I shall therefore beg to refer to the opinions themselves: *Perrin* v.

no difference where the law creates the estate for life, and when the party (1), or

(1) *Pybus* v. *Mitford*, 1 Ventr. 372.

Blake, Dougl. Rep. 329, in a note; Mr. Jus. Blackstone's Argument; Hargrave's Law Tracts, 489; Fearne's Essay Cont. Rem. 4th edit.; Mr. Hargrave's Observations concerning the Rule in *Shelly*'s case, 551; Mr. Butler's note, Co. Lit. 376; *Ambrose* v. *Hodgson*, Dougl. 323; *Jones* v. *Morgan*, 1 Bro. Ch. Rep. 218; and content myself with enumerating the cases in which the rule has not obtained, and observing upon the several points which must concur to render it applicable. The cases in which the rule has not obtained, are brought together by Sir W. Blackstone, and reduced to the following four heads:

1st. Where no estate at all, or (which is the same thing in the idea of our ancient law) where no estate of freehold is devised to the ancestor, here the heirs cannot take by descent, because the ancestor never had in him any descendible estate. And this must always be the case where the ancestor is dead at the time of the devise, as in the known case of *John de Mandeville*, Co. Lit. 26, the heir then taking a vested estate by purchase. It is also the same if the ancestor be living, and has no sort of estate devised to him, only that then the estate of the heir is contingent, because nemo est hæres viventis. And if the ancestor has only the devise of a chattel-interest, with a subsequent estate to his heirs, the heirs must likewise take as purchasers, or not take at all: for, if between the term of the ancestor and the estate to his heirs there is no vested freehold remainder, the heirs can only take by way of executory devise, which, ex vi termini, implies an estate not executed in the ancestor; or if

where there is an intervening estate (*q*) especially if not of freehold. And as

there be any such vested estate of freehold interposed between the ancestor's term and the contingent remainder to his heirs, that contingent remainder is supported entirely by the interposed estate, and does not derive its being, or any degree of assistance from the chattel estate of the ancestor. That the rule does not apply to this class of cases, is evidently referrible to the ancestor's not taking an estate of freehold, upon which word taking, it may be proper to observe that it seems immaterial, with respect to the general rule, whether the ancestor take the freehold by express limitation or by implication. *Pybus* v. *Mitford*, 1 Vent. 372. *Wills* v. *Palmer*, 5 Burr. 2615. Or whether he take it by the same instrument. See Sugd. Gilb. Uses, 36.

2d. The next case is, where no estate of inheritance is devised to the heir, as in the case of *White* and *Collins*, Com. Rep. 289. There the devise was to Frank Mildmay for life, with a power of jointuring, and after his death (and jointure, if any be) to the heir male of his body lawfully begotten, during the term of his natural life, remainder over. Common sense will here tell us, that when no estate of inheritance is devised to the heir male of the body, he cannot take by descent as heir.

3d. The third case is, where some words of explanation are annexed by the devisor himself to the word heirs in the will, whereby he discovers a consciousness, distrust, or apprehension that he may have used the word improperly, and not in its legal meaning; and

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ancestor and heir are corelative as to inheritance, so are testator and executor as

therefore he in a manner retracts it, he corrects the inaccuracy of his own phrase, and tells every reader of his will how he would have it understood. Thus in *Burchel* and *Durdant*, (2 Vent. 311. Carth. 154.) the devise was " in trust for Robert Durdant for life, and after his decease to the heirs male of his body now living;" as if the testator had said, I do not mean a perpetual succession in the male line of Robert Durdant, which perhaps may be the legal sense of heirs male of his body, but I mean by that expression, only such of his sons as are at present born and known to me; and accordingly the Court held that George Durdant, the son of Robert, and living when the will was made, should take the estate as a purchaser; so in *Lisle* and *Gray* (2 Lev. 223.) the words were " to Edward for life, remainder to his 1st, 2d, 3d, and fourth sons in tail male, and so to all and every other the heirs male of the body of Edward." Which words " and so" (together with the manifest reason of the thing) plainly showed that the " other heirs male of the body" in the subsequent clause of the will, were to be understood as " the 1st, 2d, 3d, and 4th sons" were to be understood in the preceding. And in *Lowe* and *Davis* (Lord Raym. 1561.) when the testator had first devised in a loose unguarded manner to " his son Benjamin, and his heirs lawfully to be begotten," he immediately recollected himself, and adds by way of explanation, " that is to say, to his 1st, 2d, 3d, and every other son and sons successively, lawfully to be begotten of the body of the said Benjamin," &c. This devise to the heirs thus explained was held to be by way of purchase; so in the case of *Doe*, on dem. of *Long* v. *Laming*, (2 Burr.

(2) Co. Lit. 54. Wentworth's Office of Executor, 300.

to chattels (2); and therefore a remainder of a term to the executor vests in the tes-

1100.) the devise was of gavelkind lands "to Ann Cornish and the heirs of her body begotten, as well female as male, to take as tenants in common." Now since gavelkind lands cannot descend to heirs female as well as males (as is expressly declared by the statute de prærog. regis, 17 Ed. II. c. 16.) nor can heirs as such be tenants in common, but coparceners; it is clear that by the words heirs of the body (thus explained by the words female as well as male, and to take as tenants in common) the devisor could only mean the children of Ann Cornish.

4th, The last case wherein heirs of the body have been held to be words of purchase, is where the testator hath superadded fresh limitations, and grafted other words of inheritance upon the heirs to whom he gives the estate; whereby it appears, that those heirs were meant by the testator to be the root of a new inheritance, the stock of a new descent, and were not considered merely as branches derived from their own progenitor. Where the heir is thus himself made an ancestor, it is plain that the denomination of heir of the body was merely descriptive of the person intended to take, and means no more than "such son or daughter of the tenant for life as shall also be heir of his body." The cases of *Lisle* v. *Gray*, *Lowe* v. *Davis*, and *Long* v. *Laming*, fall under this head as well as the other, these having also words of limitation superadded to the word heirs, as well as the explanatory words I before took notice of. Thus, too, in *Cheek* v. *Day*, (which as Lord Raymond observes, Fitz. 24. Fortesc. 77, is the true name of the case usually called *Clerk* v. *Day*) the devise, as

tator (*r*). Nor will the intention, though in express words, control the operation of

there cited from the roll, was " to my daughter Rose, for life; and if she marry after my death, and have any heirs lawfully begotten, I will that her heir shall have the lands after my daughter's death, and the heirs of such heir." So likewise *Archer*'s case, 1 Rep. 66, is " to the right and next heir of Robert Archer, (the tenant for life) and to the heirs of his body lawfully begotten for ever." And the case of *Backhouse* v. *Wells*, cited in 2 P. Wms. 476, is, " from and after the decease of the tenant for life, to the issue male of his body, and to the heir male of such issue male." It may be material to remark, that there is another class of cases, in which the rule in *Shelly*'s case appears not to have obtained, namely, where from the different qualities of the estates limited to the ancestor and his heirs, (as where a legal estate is limited to the ancestor, and an equitable or trust estate to the heirs, or an equitable or trust estate to the ancestor, and a legal estate to the heir) they will not unite and incorporate, so as to vest the subsequent limitation in the ancestor; *Tippin* v. *Cosin*, Carth, 272; *Lady Jones* v. *L. Say* and *Seale*, 8 Vin. Abr. 262. c. 19. Before I conclude this note, it may be proper to notice, that the rule requires the limitations to the ancestor and heir to be in the same gift or conveyance; so that if there be a limitation to a man's heirs in a deed, and he afterwards, by other means, becomes seised of the freehold, in this case the two estates will not be united in him; *Moor* v. *Parker*, Lord Raym. 37. So if there be tenant for life, and afterwards the reversion, by some other conveyance, be limited to his heirs, such limitation will not be executed in him; Skin. 559. 4 Mod. 319; *Clifton*

the law upon the words expressed (*s*); as where the ancestor has an estate for life

v. *Jackson*, 2 Vern. 486; *Key* v. *Gamble*, T. Jones, 124; *Snow* v. *Cutler*, 1 Lev. 135; Raym. 162. But if an estate be limited to one for life, by deed, and there be afterwards a limitation in his life-time to the heirs of his body, under an execution of a power of appointment conferred by the same deed, as a limitation to the use of *A.* for life, and after his decease, to such uses as *B.* shall appoint, who afterwards, in *A.*'s life, appoints to the use of the right heirs of *A.* it does appear to have been judicially determined that the limitations cannot unite, but, the latter limitation operates by way of contingent remainder to the heir; Mr. Butler, however, inclines to think the limitations will unite. See Co. Litt. 299, b. note (1). But Mr. Fearne conceives that the objections which affect Mr. Butler's mind, are capable of being obviated by an attentive consideration of the principles on which the question turns. By the terms of the rule, "mediately or immediately," the intervention of another estate between the limitations to the ancestor and his heirs, does not prevent the subsequent limitation from vesting in the ancestor. See *Colson* v. *Colson*, 2 Atk. 247. But upon this point a very material consideration occurs. If the subsequent limitation to the heirs, &c. vesting in the ancestor, where he takes a preceding estate of freehold by the same conveyance, were absolutely to merge the particular estate of freehold, it would follow, that where the limitations intervening between the preceding freehold, and such subsequent limitation to the heirs, &c. are contingent, their union would destroy the intervening limitation; therefore the two limitations are united and executed in the ancestor only, until such

given to him expressly, a limitation after to his heirs, or to the heirs male of his

time as the intervening limitations become vested, and then open, and become separated, in order to admit such intervening limitations, as they arise. Thus, where there was a limitation to baron and feme, for their lives, remainder to the first and other sons of the marriage successively, in tail; remainder to the heirs male of the bodies of the baron and feme; the Court resolved, that it was an estate tail executed in the baron and feme, sub modo; that is, so as not to merge the estates for life absolutely, but executed only till the birth of the first son; and that then the estates should become divided, by operation of law, and the baron and feme, become tenants for their lives, with remainder to their first and other sons, remainder to the baron and feme, in tail. Upon which distinction it has been held, that if the intervening limitation be merely contingent, and the contingency does not happen, though it possibly might have happened during the particular estate, the widow would be dowable; *Hooker* v. *Hooker*, Rep. Temp. Hardw. 13. But if such intervening limitations were vested by the contingency happening or vested in their creation, the widow would not be dowable, *Duncombe* v. *Duncombe*, 3 Lev. 437.

(*q*) I have, in the above note (*p*), referred to the difference where the intervening estate is vested, and where a contingent limitation.

(*r*) This point appears to have been admitted in Dyer, 309. Yelv. 85. But see *Sparke* v. *Sparke*, Moor, 666, contra. See also *Cranmer*'s case, 2 Leon. 6. 3 Leon. 20.

body, puts the estate of inheritance in himself; otherwise, perhaps, of heir male only in the singular number, especially if there be words of limitation after it (3). And though there be a difference in words, when the land of freehold is devised to one for life, the remainder to his heirs, mediately or immediately; and where a term is so devised, the difference is in words only, for the testator's meaning is the same, &c. (*t*).

(3) *Archer's* case, 1 Rep. 66.

(*s*) See Mr. Hargrave's observations on the rule in *Shelly's* case, and Mr. Fearne's Essay Cont. Rem. 300, 301.

(*t*) In the case of *Peacock* v. *Spooner*, 2 Vern. 195, the words heirs of the body were allowed, in the assignment of a term, to prevail as words of purchase, notwithstanding a prior limitation to the ancestor for life. So also in *Dafforne* v. *Goodman*, 2 Vern. 362. But the authority of these cases is materially shaken, and is only attended to in cases exactly the same *in specie*. *Webb* v. *Webb*, 1 P. Wms. 132; *Garth* v. *Baldwin*, 2 Ves. 660. It may, therefore, be stated as a general rule, that whatever words would, in the disposition of real estate, give an express estate tail, or such estate by implication, will, in the disposition of a chattel real or personalty, carry the whole interest; *Webb* v. *Webb*, 1 P. Wms. 131; *Seale* v. *Seale*, 1 P. Wms. 289; *Atkinson* v. *Hutchinson*, 3 P. Wms. 259; *Dod* v. *Dickinson*, 8 Vin. Ab. 451. pl. 25; *Fereys* v. *Robertson*, Bunb. 301; *Butterfield* v. *Butterfield*, 3 Ves. 133, 154; *Saltern* v. *Saltern*,

2 Atk. 376; *Earl of Chatham* v. *Tothill*, 6 Bro. P. C. 450; *Garth* v. *Baldwin*, 2 Ves. 660, are authorities in which words which would have passed an express estate tail, have been held to give an absolute interest in a chattel or personalty: And *Burford* v. *Lee*, 2 Freem. 210. *Anon.* 2 Freem. 287; *Green* v. *Rod.* Fitzgib. 68, are direct authorities to shew that the same construction applies to words which create an estate tail by implication only. See Fearne's Essay Ex. Dev. 362. *et seq.* But, though such be the general rule, it shall not prevail, if, from any expression in the will, the testator appear to have intended the heirs or issue to take by purchase; *Warman* v. *Seaman*, Finch's Rep. 279; *Clare* v. *Clare*, Forrest. 21; *Hodgson* v. *Bussey*, 2 Atk. 89; *Doe* v. *Lyde*, 1 Term Rep. 593. See also *Beauclerk* v. *Dormer*, 2 Atk. 312; *Knight* v. *Ellis*, 2 Bro. Ch. Rep. 570.

SECTION V.

THERE ought also to be one universal rule of property in the realm, the same in Chancery (1) as at common law (*u*). And there-

(1) *Duke of Norfolk*'s case, 3 Ch. Ca. 48. *D. of Marlborough* v. *L. Godolphin*, 1 Eden's Rep. 404. *Heath* v. *Heath*, 2 Eden's Rep. 330.

(*u*) And therefore limitations of estates, whether by way of trust, or by estate executed at common law, are to be governed by the same rule. See b. 1. c. 6. s. 7, 8, and the cases there referred to.

fore the rules to prevent perpetuities (*x*) are the policy of the kingdom, and must take

(*x*) A perpetuity is where, though all who have interest should join in a conveyance, they could not bar or pass the estate; *Washbourn* v. *Downes*, 1 Ch. Ca. 213. See also *Duke of Norfolk*'s case, 3 Ch. Ca. 35. *Barlow* v. *Salter*, 17 Vez. 479. Various have been the attempts to establish perpetuities, by controlling the exercise of that right of alienation which is inseparable from the estate of a tenant in tail. The chief of them are brought together by Mr. Knowler, in the case of *Taylor*, on dem. of *Atkins* v. *Horde*, 1 Burr. 84, who observes, that the power to suffer a common recovery is a privilege inseparably incident to an estate tail. It is a potestas alienandi, which is not restrained by the statute de donis, and has been so considered ever since *Taltarum*'s case (12 E. IV. 14, b. pl. 16.): and this power to suffer a common recovery cannot be restrained by condition, limitation, custom, recognizance, statute, or covenant. 1st, That it cannot be restrained by condition, appears by Co. Litt. 223, 224, and *Sonday*'s case, 9 Rep. 128. But this doctrine does not extend to a feoffment, a fine at common law or any other alienation, which works a discontinuance, and is therefore considered in the law as tortious; a proviso, therefore, restrictive of such mode of alienation, may be annexed to an estate tail, either as a condition to determine the estate and give the donor and his heirs a right of reentry, or by way of limitation, to make the estate of the tenant in tail cease, and the lands remain over to a third person. See Mr. Butler's note (1), Co. Litt. 223, b. *Pearce* v. *Win*, 1 Ventr. 321. 2dly, That it cannot be restrained by limitation, appears by Cro. Jac. 696, *Foy* v. *Hinde*, and by *Sonday*'s case. 3dly,

place in a court of equity as well as in courts of law (2); and it is an undeniable reason against any settlement: so that there can be no such thing as a perpetual limitation of a freehold. And if there be a devise over to a charity, in case he go about to alien, it will not avail, or make the condition good (3). However, where the will is directory, there ought to be a strict settlement made (4), and the intent followed, as far as the rules of law will permit (*y*).

(2) *Duke of Norfolk's* case, 3 Ch. Ca. 48. *Chudleigh's* case, 1 Rep. 138.

(3) *Company of Pewterers* v. *Christ's Hospital*, 1 Vern. 161.

(4) *Humberston* v. *Humberston*, 1 Vern. 738. 1 P. Wms. 332. Gilb. Uses, 77.

That it cannot be restrained by custom, appears by the case of *Taylor* v. *Shaw*, Carter 6 and 22. 4thly, That it cannot be restrained by recognizance or statute, appears by *Poole's* case, cited in Moore, 810. 5thly, That it cannot be restrained by covenant, appears by the case of *Collins* v. *Plumer*, 1 P. Wms. 104. 6thly, That an attempt to suffer a common recovery cannot be restrained, appears by *Corbet's* case, 1 Rep. 83. *Mildmay's* case, 6 Rep. 40. *Pierce* v. *Win*, 1 Ventr. 321. And 7thly, That a conclusion or agreement to suffer a common recovery cannot be restrained, appears by *Mary Portington's* case, 10 Rep. 35. See *Woodford* v. *Thelluson*, 4 Ves. 227, &c. in which the subject is most elaborately discussed.

(*y*) In the case referred to, the limitation was decreed to be to the first son unborn, in tail; whereas, if the limitation had been so framed, as to suspend the right of alienation of the estate, so long as the law

Nor can a devise direct an inheritance to descend against the rules of law (5), as to the heirs male in fee; for what could not be made valid by any act executed in his life-time, cannot be good in a devise; and therefore a term limited to a man and his heirs shall go to the executors (6). So a will in Dutch or Latin, or any other language, respecting lands in England, must be so framed, as to pass the estate (z) ac-

(5) Co. Litt. 25, a.

(6) *Duke of Norfolk's* case, 1 Vern. 164.

would allow, the limitation might have been made dependent on such unborn son attaining twenty-one: and in the case of *Vaughan* v. *Burslem*, 3 Bro. Ch. R. 101. Lord Thurlow, C. observed, that he knew no instance in which the conveyance had been carried to the utmost extent of what the law might do. But see *Gower* v. *Grosvenor*, Bard. 54. *D. of Newcastle* v. *Countess of Lincoln*, 3 Ves. jun. 387. *Carr* v. *E. of Erroll*, 14 Ves. 478. As to the general question, What estate a child must take under a limitation to him before his birth? see *Godolphin* v. *Godolphin*, 1 Ves. 21. *Hucks* v. *Hucks*, 2 Ves. 568. *Chapman* v. *Brown*, 3 Burr. 1626. Fearne's Essay Ex. Dev. 391, 392.

(z) Nor will the circumstance of the will being made abroad, if of lands in England, make any difference; for being of lands in England, if they pass by will, they must pass by such a will, and so authenticated and attested, as the laws of England require. *Coppin* v. *Coppin*, 2 P. Wms. 293. The law of the place in which the disposition of it happens to be made, being in this particular controlled ratione rei sitæ. See B. 5, c. 1. s. 2.

cording to the rules of our law (7); for a will or other act of the party cannot rule the law, but the law rules them.

(7) *Bovey v. Smith*, 1 Vern. 85.

SECTION VI.

But so long as it may be made consistent with the rules of law, the devise shall not be impeached. And therefore, although a freehold cannot be granted in futuro, by a conveyance (*a*) in his lifetime; yet where a

(*a*) This must be understood by conveyance at common law; for though, by conveyance at common law, the freehold necessarily passes out of the grantor, and therefore requires some person in being, in whom it can immediately vest; yet such necessity does not exist in cases of conveyances, under the statute of uses, trusts in equity, or grants of rents de novo; for in neither of these cases is the freehold for an instant in abeyance. For, as to conveyances under the statute of uses, till there is some person in being in whom the use can vest, the possession is not altered, but continues in the feoffor and his heirs; Co. Litt. 23. (unless the feoffor has expressly limited to himself a less estate, in which case the limitations over for want of a preceding freehold would be void. *Rawley* v. *Holland*;

man in his will gives a future estate to arise upon a contingency, and does not part with the fee at present, but retains it, this is not against law (*b*). For, by the common law,

2 Eq. Ca. Ab. 753. See also Fearne's Cont. Rem. 4th. ed. 50, 51.) As to executory trusts, the legal estate immediately vests and continues in the trustee: and as to rents de novo, the tenant continues in possession of the land out of which they issue. Gilb. Uses, 193. Sugd. Ed. However, it is to be observed, that in cases of wills, uses, and trusts, if it be inconsistent with the estate, expressly declared, that the freehold should remain with the party, as if he has a term of years expressly given him, the law will not give him by implication an estate of freehold. *Adams* v. *Savage*, 2 Salk. 679. *Rawley* v. *Holland*, 2 Eq. Ca. Ab. 753. Fearne's Cont. Rem. 31. Mr. Butler's note (2), Co. Litt. 216.

(*b*) Such a disposition of lands is termed an executory devise, which Mr. Fearne defines to be strictly a limitation of a future estate, or interest in lands or chattels, (though in the case of chattels, it is more properly an executory bequest,) which the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law. Essay on Executory Devises, 298. An executory devise differs from a remainder in three very material points. 1st, It needs not any particular estate to support it. 2d, By it a fee simple, or other less estate, may be limited after a fee simple. 3d, By this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same. To which may be

one might devise that his executor should sell his land and in such case the vendee

added a fourth distinction, that after an executory devise, all other subsequent limitations are also executory; whereas a remainder may be vested after a contingent remainder, if such contingent limitation do not carry the whole fee.

1. "The first case happens," says Sir W. Blackstone, "when a man devises a future estate to arise upon a contingency, and till that contingency happens, does not dispose of the fee simple, but leaves it to descend to his heir at law; as if one devises land to a feme sole and her heirs upon her day of marriage, here is in effect a contingent remainder, without any particular estate to support it, a freehold commencing in futuro. This limitation, though it would be void in a deed, yet it is good in a will by way of executory devise. For since by a devise a freehold may pass without corporeal tradition or livery of seisin, (as it must do if it passes at all,) therefore it may commence in futuro, because the principal reason why it cannot commence in futuro in other cases is the necessity of actual seisin, which always operates in præsenti. And since it may thus commence in futuro, there is no need of a particular estate to support it, the only use of which is to make the remainder by its unity with the particular estate a present interest."

2. "By executory devise, a fee or other less estate may be limited after a fee; and this happens where a devisor devises his whole estate in fee: but limits a remainder thereon, to commence on a future contingency, as if a man devises land to *A.* and his heirs,

is in by the will, and the fee descends to the heir in the mean time(1); and of the same nature with these are springing uses(c).

(1) *Scatterwood v. Edge*, 1. Salk. 229.

but if he die before twenty-one, then to *B.* and his heirs; this remainder, though void in a deed, is good by way of executory devise."

3. "By executory devise, a term of years may be given to one man for his life, and afterwards limited over in remainder to another, which could not be done by deed. For by law, the first grant of it to a man for life was a total disposition of the whole term, a life estate being esteemed of a higher and larger nature than any term of years;" 2 Bla. Com. 173.

It is observable that the learned commentator in the above illustrations of the nature of the first and second kinds of executory devises, states them to be limitations which could not take effect by deed, without distinguishing deeds which operate by the rules of the common law, from such as operate by way of use, an omission the more remarkable, as he afterwards observes, that the indulgence allowed to executory devises, when devises by will were again introduced, was adopted from the favourable construction allowed to declarations of uses, 2 Bla. Com. 334. With respect to his observation, that after the limitation of a term to one for life no remainder could be limited over by deed, it seems material to remark that even in a deed such limitation over will be good, if by way of trust. See B. 1. c. 4. s. 2. note (*f*), Fearne's Ex. Dev. 304, 407.

(c) A springing use is an use limited to arise upon

But as for springing uses, like executory devises, they are either present or future,

some particular contingency; it differs from a contingent remainder, 1st, That though there must be a preceding vested estate, yet a preceding particular estate of freehold is not necessary to support it. It differs from an executory devise in this, that there must be a person seised to such use when the contingency happens, or it cannot be executed by the statute; therefore if the cestui que use in tail, by discontinuance, or the feoffee to uses, or the person out of whose seisin, the use is to be served by alienation or otherwise, destroy his estate or his possibility, the use is destroyed for ever. 1 Rep. 134. Cro. Eliz. 439. Whereas by an executory devise the freehold itself is transferred, and there needs no person to be seised to execute an estate in the devisee. Gilb. Uses, 127. 2dly, It further differs from a remainder, as no remainder can be limited by the act of the party upon or after a fee. Co. Litt. 18. Whereas a fee may be limited determinable upon a contingent event by way of shifting use. Bro. Feoffment al. Uses. Stat. 6 Ed. VI. 1 Roll's Ab. 415. *Lloyd* v. *Carew*, Pre. Ch. 71. Show. P. C. 137. *Pells* v. *Browne*, Cro. Ja. 590. Sanders on Uses, 187. & seq. A remainder being a remnant of an estate in lands or tenements expectant on a particular estate, created together with the same, at the same time must wait for, and only takes effect on the regular expiration and determination of the particular estate, it cannot be so limited as to defeat or abridge the particular estate. Fearne's Cont. Rem. 9. & seq. Butler's note(1), Co. Litt. 203. b. But a preceding particular estate may be abridged and determined by way of secondary use, as if the limitation be to *A.* for life

If present, the party must be in esse & capax at the time; for it shall take effect

in tail or in fee, *provided*, that where *C.* returns from Rome it shall thenceforth remain to the use of *B.* in fee. Butler's note(1), Co. Litt. 203. b. Mr. Saunders, however, submits, that a difference should be made between those cases where the grantor only parts in the first instance with an estate less than the fee, such as a plain gift in tail, or lease for life; and those where the grantor departs with the whole fee, thereby transferring a seisin to the grantee, to serve uses limited to create particular estates, such as a feoffment in fee, to the use of *B.* in tail, or for life, *provided*, when *C.* returns from Rome, it shall then be to the use of *C.* For in the former case, in order to make the estate cease before its regularly and legally appointed period, and go over to another, there should be regular words of limitation, expressive of the intention of the parties, in which case the remainder is said to take effect by way of conditional limitation. The words of limitation, are, so long, while, or until: when these words are used, then immediately upon the contingencies happening, the estate of the grantee ceases, and the next subsequent estate vests; but if mere words of condition then the estate limited upon such condition, to go to a third person, will be void as a remainder, and as a conditional limitation. These words of condition are generally upon condition so that, or provided. Therefore if a lease for life is made upon condition, that if a stranger pay the lessor 20*l.* then immediately the land shall remain to the stranger. This, as a condition to give the stranger entry, is void, being an abridgment of the particular estate; there being also express words of condition, it cannot enure as a

according to the intent, or not at all. As a feoffment to the right heirs of *B.* is not good as to a springing use; because it is by way of present limitation, et non est hæres viventis: Otherwise if it were future,

conditional limitation; and as a springing use it can never arise, for to create a springing use there must be a sufficient seisin in some one to serve it when it comes in esse; but here there is no seisin to serve the shifting use, for the lessee has only a seisin to serve the use implied to himself, and when his estate for life is determined the seisin to serve the uses is determined also. But if a feoffment had been made in fee to the use of *A.* for life, and if *B.* do such a thing, then to the use of *B.* in fee, the use to *B.* will take effect in abridgment of the estate for life of *A.* Sanders on Uses, 183, 184. 3d, An executory or springing use differs from a contingent remainder in this further particular, that as cestui que use for life cannot as such be seised to the use, but the seisin to serve it when it comes in esse, must be independent of such estate for life, the cestui que use for life cannot by forfeiture of his life estate wholly destroy the contingent springing use. See *Chudleigh*'s case, 1 Rep. (but quere, whether the person seised must not enter to restore the use? See Saunders on Uses, 224, 225. Fearne's Essay Con. Rem. 220, et seq.)* Whereas a contingent remainder, unless protected by a general trust, or by trustees interposed for the purpose of preserving it, or by an intervening vested remainder, may be defeated by tenant for life, by feoffment, fine or recovery, but not by an innocent conveyance, as lease and release, bargain and sale, or condition to stand seised. Gilb. R. 235.

as to the right heirs of *B.* after his death (*d*) & sic nota diversitatem inter verba de præ-

Archer's case, 1 Rep. 66. *Loddington* v. *Kime,* Ld. Raym. 203. *Denn* v. *Puckey,* 5 Term Rep. 299. See Sugden's ed. of Gilb. Uses, 152, where the distinctions upon this subject are very carefully stated, and the general doctrine of Uses is illustrated in the notes.

(*d*) The two first cases referred to are authorities in support of such a distinction, but they seem to be very materially shaken, if not over-ruled, by the modern cases of *Harris* v. *Barnes,* 4 Burr. 2157, and *Coe* v. *Carlton,* 1 Wils. 225. It was also formerly doubted whether a devise to an infant in ventre sa mere was good or not, though it was admitted that a devise to an infant when he should be born was good. *Snow* v. *Cutler,* 1 Lev. 135. But it is now clearly agreed that a devise to an infant in ventre sa mere is good; *Taylor* v. *Bydell,* 1 Freem. 243. *Anon.* 293. *Gulliver* v. *Wickett,* 1 Wil. 106. *Chapman* v. *Blisset,* Forrest. 145. *Brudenell* v. *Elwes,* 1 East's Rep. 452. *Hay* v. *E. of Coventry,* 3 Term. R. 86. 1 Eden's Rep. 409, 410. But the court will not construe a will to extend to persons not in being, unless the testator shew such to be his intention by words in the will. *Ellison* v. *Airey,* 1 Ves. 111. *Pearson* v. *Garnett,* 2 Bro. Ch. Rep. 47. *Cooper* v. *Forbes,* 2 Bro. Ch. Rep. 63. *Bennet* v. *Honeywood,* Ambl. Rep. 708. See also *Jee* v. *Audley,* 1 Cox's R. 324. The inference to be drawn from the cases upon this point seems to be, as stated by Mr. Fearne, that whatever force is to be allowed to the distinction between executory limitation per verba de præsenti, et per verba de futuro, it can affect only those cases where there is not the least circumstance from which to collect the

senti, & verba de futuro (2). 2dly, If future they must arise within a reasonable time (*e*); as a feoffment to the use of *A*.

(2) *Goodright* v. *Cornish*, 1 Salk. 226. *Scatterwood* v. *Edge*, 1 Salk. 229. See also *Moor* v. *Parker*, 1 Ld. Raym. 37. *Goodman* v. *Goodright*, 2 Burr. 873.

testator's intention of any thing else, than an immediate devise to take effect in præsenti. Essay on Executory Dev. 431, 432.

(*e*) Every future interest, springing or secondary use, or trust executory, must be so limited, as necessarily to take effect, if at all, within a live or lives in being, and twenty-one years and some months over; a period which Mr. Hargrave observes, was not arbitrarily prescribed by our courts of justice, but wisely and reasonably adopted in analogy to the cases of freehold and inheritance, which cannot be limited by way of remainder, so as to postpone a complete bar of the entail by fine or recovery for a longer space. Co. Litt. 20, a. note (5). The same analogy has been observed with respect to secondary fees, when limited upon an estate in fee simple. But the reason which induced the courts to adopt this analogy with respect to those estates when limited upon an estate in fee simple, does not hold when they are limited upon or after an estate tail, because, when they are limited upon or after an estate tail, the tenant in tail, by suffering a common recovery before the event takes place, bars or defeats the secondary estate, and acquires the fee simple absolutely discharged from it. See Mr. Butler's note, Co. Litt. 274, b. Fearne's Ex. Dev. 314. Whence it might be inferred, that a springing or secondary use, if limited on an estate in fee-simple, cannot be barred or otherwise defeated, an inference by no means correct. For though it be true, that an executory devise limited on a fee

after the death of *B.* without issue, within twenty or thirty years, or the compass of a life or lives, is good as a springing use (3), and the whole estate remains in the feoffor (*f*) in the mean time (4); for let there be ever

(3) *Duke of Norfolk's* case, 31. *Lloyd* v. *Carew*, Pre.Ch. 472. *Stephens* v. *Stephens*, Forrest. 228. But see *E. of Stamford* v. *Sir John Hobart*, 1 Bro. P. C. 288, *Woodford* v. *Thellusgn*, 4 Ves. 227, &c. *Long* v. *Blackill*, 7 Term. Rep. 100.

(4) *Davis* v. *Speed*, Carth. 262. Skin. 352.

cannot be barred or defeated, as determined in *Pells* v. *Brown*, Cro. Jac. 592; yet a springing or secondary use may, as already observed, be defeated before the use arise by the destruction of seisin, out of which the future use is to take effect, as by a feoffment upon a good consideration, and without notice; *Wood* v. *Reynolds*, Cro. Eliz. 764, 765, or by a devise of the land, Moor, 731. Gilb. Uses, 125; *Saunders* on Uses. Subject to this exception, it may be taken as true, that a springing or secondary use cannot be defeated, if limited upon or after an estate in fee simple.

(*f*) And in the case of an executory devise, if the freehold and inheritance in the mean time be not disposed of, they descend to the testator's heir at law. *Pay*'s case, Cro. Eliz. 878. *Clark* v. *Smith*, Lutwyche, 793. *Gore* v. *Gore*, 2 P.Wms. 28. *Hopkins* v. *Hopkins*, Forrest. 44. *Bullock* v. *Stones*, 2 Ves. 521, unless there be a devise of the residue. *Stephens* v. *Stephens*, Forrest. 228. *Gibson* v. *Rogers*, Ambl. 96. *Bland* v. *Bland*, 2 Cox's Rep. 349. See also *Glanvill* v. *Glanvill*, 2 Merrivale, 38. *Generey* v. *Fitzgerald*, 31st July, 1818, Rolls. *Fearne*'s Ex. Dev. 432. So if an estate be devised upon a future contingency, and no intermediate disposition of the rents and profits, it is a resulting trust for the heir. *Attorney General* v. *Bowyer*, 3 Ves. 725.

so many, it is but one life, and must have an end. But a springing executory use, after a dying without issue (5) the law will not allow (*g*). Nor can it be limited after a fee; for after such a disposal, nothing remains in the owner to limit. But there may be two concurrent contingencies, and not expectant one after the other (*h*); as where

(5) *Lady Lanesborough* v. *Fox*, Forrest. 262. *Goodman* v. *Goodright*, 2 Burr. 877. *Doe* v. *Fonnereau*, Doug. Rep. 487.

(*g*) A limitation to take effect after an indefinite failure of issue is certainly void, as well by way of springing use as of an executory devise, *Jeffery* v. *Sprigge*, 1 Cox's Rep. 63; but, in the construction of wills, courts of law and equity will anxiously avail themselves of any expression by which the limitation may be restrained, and made to depend on a default of issue living at the time of the death of the devisees in tail. See *Porter* v. *Bradley*, 3 Term Rep. 143. *Daintry* v. *Daintry*, 6 Term Rep. 307. But if the limitation, after an executory devise in tail, be so framed as to take effect, either in lieu of the preceding executory devise, if that fail, or as a remainder to depend upon it, if it take effect, it is good. See *Gore* v. *Gore*, 2 P. Wms. 28; *Brownsword* v. *Edwards*, 2 Ves. 243; *Doe* v. *Fonnereau*, Dougl. Rep. 470; *Fearne*'s Ex. Dev. 339; *Bodens* v. *Ld. Galway*, 2 Eden's R. 298; 2 *Bridgman*'s Dig. 244. As to accumulations as restricted by 39 and 40 Geo. III. see *Longdon* v. *Simson*, 12 Ves. 295; *Griffiths* v. *Vere*, 9 Ves. 127; *Lord Southampton* v. *M. of Hertford*, 2 Ves. & B. 54.

(*h*) Such limitations are sometimes called limitations on a contingency, with a double aspect; sometimes limitations on a double contingency; and sometimes concurrent or contemporary limitations. Upon the

the devisor parts with the whole fee simple, but upon some contingency qualifies that disposition, and limits another fee, which is altogether new in law (6). And the ulti-

(6) *Loddington* v. *Kime*, 1 L. Raym. 203. 1 Salk. 224. *Doe* v. *Holme*, 3 Wils. 237, 241, 2 Bla. Rep. 777. *Goodright* v. *Durham*, Dougl. Rep. 265, 8vo. ed. *Denn* v. *Puckey*, 5 Term Rep. 299. Fearne's Essay, Cont. Rem. 292, 293.

second and third of which determinations, Mr. Douglas observes, that there are other limitations on a double contingency; as where an estate is limited to *A.* for life, remainder to *B.* in tail, remainder to *C.*, here the time when *C.*'s estate shall vest in possession, depends on a double contingency. 1. If *B.* die without issue before *A.* it will vest immediately on the death of *A.* 2. If *B.* outlive *A.* it cannot vest till after the estate tail in *B.* is at an end. And, as to the third denomination, he observes, they certainly are not aptly described by the words concurrent or contemporary, such epithets being rather expressive of estates which take effect at one and the same time. Note (2); *Doe* v. *Fonnereau*, Dougl. Rep. 504, 8vo. But though two or more several contingent fees may be limited concurrently by will or by deed, by way of use, (*Lloyd* v. *Carew*, Pre. Ch. 72.) so as to be substitutes or alternatives one for the other, and not to interfere, yet one only can take effect; for every such contingent limitation is only a disposition, substituted in the room of the others, upon the event of their failing. *Fearne*'s Cont. Rem. 293. Such limitations, however, may, if contingent remainders of freehold, and not protected by trustees, (not so of copyhold) be barred by a recovery suffered by a tenant for life. See *Loddington* v. *Kime*, 1 Ld. Raymond, 203; *Denn* v. *Puckey*, 5 Term Rep. 299; *Doe* v. *Burnsall*, 6 Term Rep. 30.

mam quod sit of a fee upon a fee in the limitation of an use is not yet plainly determined. It may be extended further than a life or lives as to a year after (*i*); and the rule is to stop when it proves inconvenient (7). Nor is there any danger of a perpetuity from these uses, as from executory devises; for all uses, as well in esse as otherwise, may be destroyed by the alteration of the estate to one against whom the remedy fails in equity, there being no confidence expressed or implied (8); but every executory devise is a perpetuity, as far as it goes, that is, an estate unalienable, though all mankind join in a conveyance (*k*); and it is to be remem-

(*i*) *Lloyd* v. *Carew*, Pre. Ch. 74. *D. of Norfolk*'s case, 3 Ch. Ca. 31, 36.

(8) *Chudleigh*'s case, 1 Rep. 138. See b. 2. c. 6. § 1.

(*i*) Lord Talbot, C. in the case of *Stephens* v. *Stephens*, Forrest. 228. held an executory devise, which must, in the nature of the limitation, vest within twenty-one years after the period of a life in being, to be good; and the authority of this decision has been recognized in a variety of cases. And as the doctrine of executory devises is to be referred to the indulgence afforded by the courts of law, prior to the statute of wills, in the construction of declaration of uses, it follows, that a secondary shifting use may be effectually limited, if to arise within the same period. See *Fearne*'s Cont. Rem. 321; *Massenburgh* v. *Ash*, 1 Vern. 234. 257. 304; *Long* v. *Blackall*, 7 Term Rep. 100; *Woodford* v. *Thellusson*, 4 Ves. 227, &c.

(*k*) That an executory devise cannot be barred without the concurrence of the person entitled to take be-

bered, that as an executory devise is never after a freehold, but is construed a contingent remainder (9), because it is admitted only for the necessity, and to support the intent (*l*), as after a term for years, or the

(9) *Purefoy* v. *Rogers*, 2 Saund. 380. Fearne's Ex. Dev. 299, 420. *Southby* v. *Stonehouse*, 2 Ves. 616.

nefit under it, may be admitted; but that, though all persons interested in the executory devise will come in as vouchees, the executory devise cannot be barred by such concurrence, is a position at least doubtful. See *Pells* v. *Brown*, Cro. Jac. 590. *Fearne's* Ex. Dev. 307.

(*l*) Though, whenever a contingent limitation be preceded by a freehold capable of supporting it, it is construed a contingent remainder, and not an executory devise, yet as it is possible that the freehold so limited may, by subsequent accident, become incapable of ever taking effect, (as by the death of the first devisee in the testator's life-time,) in which case the subsequent limitation, if the contingency has not then happened, will be in the same condition at the testator's death, (that is, at the time when the will is to take effect,) as if it had been limited without any preceding freehold; now, in this case, it has been held, that where such subsequent contingent limitation could not vest at the testator's death, it shall enure as an executory devise, rather than fail for want of that preceding freehold which had never taken effect. *Hopkins* v. *Hopkins*, 1 Atk. 582. Forrest. 44, and cases there cited. *Brownsword* v. *Edwards*, 2 Ves. 249. *Doe* v. *Fonnereau*, Dougl. 487. But when a preceding freehold has once vested, no subsequent accident will make a contingent remainder enure as an executory devise. *Fearne's* Ex. Dev. 420.

like, upon which a contingent remainder cannot depend, by reason of the abeyance of the freehold; so there is the same between a future use, and a contingent remainder by way of use (10).

(10) See *Goodtitle* v. *Billington*, Dougl. Rep. 729.

CHAP. IV.

Of the Limitation of Uses where the Intent does not appear.

SECTION I.

BUT further, where the intent of the parties does not specially appear, it is intended to agree with the rules of law (1). And therefore the Chancellor, in case of an use, often (*a*) adjudged by imitation of the rules of law, and according to the nature and quality of the land; as in case de possessione fratris, Borough-English, gavelkind, lands on the mother's side, &c. (2). For Chancery will consult with the rules of law, where the intention of the parties does not

(1) *Taylor* v. *Bydewell*, 1 Freem. 243. *Bowes* v. *Blackett*, Cowp. Rep. 240.

(2) Co. Litt. 13, a. 14, b. *Beckwith's* case, 2 Rep. 58. *Chudleigh's* case, 1 Rep. 127. 2 Roll's Ab. 780. *Banks* v. *Sutton*, 2 P. Wms. 713. *Cowper* v. *E. of Cowper*, 2 P. Wms. 73.

(*a*) The instances in which Chancery did not adopt the rule of law, are pointed out by Lord Bacon in his Reading on the Statute of Uses, (8vo. edit. p. 308,) and referred to the difference between uses and the land itself, or, as he expresses himself, between uses and cases of possession.

specially appear. So the widow of the cestui que trust of a copyhold estate ought to have a free bench or widow's estate, as well as if the husband had had the legal estate in him (*b*). And there it may be said, that æquitas sequitur legem. So a tenant by the curtesy shall be decreed of the trust (*c*), as well as of a legal estate (3). But dower (*d*) is not allowed out of a trust

(3) *Sweetapple* v. *Bindon*, 2 Vern. 536. *Casborne* v. *Scarfe*, 1 Atk. 603. *Watts* v. *Ball*, 1 P. Wms. 108.

(*b*) This doctrine, though distinctly stated in *Otway* v. *Hudson*, 2 Vern. 585, and recognized by Sir J. Jekyll, Master of the Rolls, in his judgment in the case of *Banks* v. *Sutton*, 1 P. Will. 712, is at least shaken by the later cases, in which it has been held that a wife shall not be endowed of a trust estate of inheritance; and it is more especially shaken by the observations which fell from Lord Hardwicke, in giving judgment on a nearly similar case. *Godwin* v. *Winsmore*, 2 Atk. 525.

(*c*) But the husband of a feme cestui que use was not permitted to have his curtesy at common law; 1 Rep. 123, b. Perkins, § 463, 457. Gilb. Uses, 25, 239; which appears also from the preamble of the statute of uses, which enumerates the inconveniences resulting from them.

(*d*) Several distinctions are taken upon this point, in the judgment given by Sir J. Jekyll, in the case of *Banks* v. *Sutton*, 2 P. Will. 700. But it seems now settled, that a wife shall not be endowed of a trust estate of inheritance, whether the trust be created by the husband himself or by a stranger. *Chaplin* v.

estate (4) of inheritance, nor was it anciently of an use: and most estates being then in use, was the first occasion and original of jointures (5): though no manner of reason can be given for it, if it were res integra, but the authorities are clearly so, and it would overturn many settlements to make an alteration in it.

(4) *Colt* v. *Colt*, 1 Ch. Rep. 254. 134. 3d ed.

(5) *Vernon's* case, 4 Rep. 1. b. Gilbert's Uses, 25. 2 Bla. Com. 137.

Chaplin, 3 P. Will. 229. *Attorney General* v. *Scott*, Forrest. 138. *Godwin* v. *Winsmore*, 2 Atk. 525. *Dixon* v. *Saville*, 1 Bro. Ch. Rep. 326. As to the widow of a cestui que trust of a copyhold, see 3 P. Wms. 229. 2 Atk. 525. 1 P. Wms. 62. L. Raym. 1028. 1 Salk. 243. 3 Leon. 208. Nor will the husband, having obtained a decree directing the trustees to purchase, and to convey to him the legal estate, differ the case. *Gulston* v. *Gulston*, per Master of the Rolls, 16th July, 1792. In *Ryall* v. *Rowle*, 1 Ves. 357, Lord Hardwicke observes, that the only case in which, as to rules of property, courts of equity do not follow the law, is, that a widow is not entitled to dower out of a trust estate. See § 2, note (*d*).

In what cases the widow shall be endowed, notwithstanding a trust term outstanding, see § 5.

SECTION II.

UPON the same kind of reasoning it is that a trust of a term must go as the term at law would have done by the like limitations (*d*); and if it be given to two jointly, as survivorship would have taken place at

(*d*) This rule seems to be laid down in too great a latitude. I have already, vol. 1. p. 213, had occasion to observe, that, at common law, the remainder of a term, after a limitation for life, was considered as void, and that the allowance of such limitation in courts of law has hitherto been confined to cases of executory devises; whereas, in equity, such limitations over of a term in trust, created by deed, have been allowed; *Walmstrey* v. *Tanfield*, 1 Ch. Rep. 16; *Massenburgh* v. *Ash*, 1 Vern. 234, 304; an executory devise of a term, and the limitation of the trusts of a term, being governed by the same rules. Fearne's Ex. Dev. 354. But if such limitations over of a term in trust, created by deed, would not be allowed to operate in courts of law, it must necessarily follow, that in the construction of such limitations over in a deed, courts of equity do not consider themselves strictly bound to apply the rule which courts of law would have applied to similar limitations of the term itself.

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law, it must do the same in equity (1) (*e*); yet the advantage of survivorship is against equity (*f*), but the Judges will have it so even in a devise to executors (2). And the distinction seems to be, where two become joint-tenants, or jointly interested in a thing by way of gift, or the like, there the same

(1) *Aston* v. *Smallman*, 2 Vern. 556. *Webb* v. *Webb*, 2 Vern. 668. *D. of Norfolk* v. *Howard*, 1 Vern. 164.

(2) *Draper's* case, 2 Ch. Ca. 64. *Lady Shore* v. *Billingsby*, 1 Vern. 482. See also *Webster* v. *Webster*, 2 P. Wms. 347. *Cray* v. *Willis*, 2 P. Wms. 529. *Willing* v. *Baine*, 3 P. Wms. 114. *Perkins* v. *Bayntum*, 1 Bro. Ch. Rep. 118. *Frewen* v. *Rolfe*, 2 Bro. Ch. Rep. 220. *Joliffe* v. *East*, 3 Bro. Ch. Rep. 25. *Baldwin* v. *Johnson*, 3 Bro. Ch. Rep. 455.

(*e*) Unless there be an agreement between them to sever the joint tenancy; *Frewen* v. *Rolfe*, 2 Bro. Ch. Rep. 220, 224; *Parteriche* v. *Pawlett*, 2 Atk. 55; *Moyse* v. *Giles*, 2 Vern. 385, 2 Ves. J. 98. 124. 170. 2 Atk. 380. Ambl. 197. 3 Atk. 627. That a dormant surrender will operate a severance, see *Gale* v. *Gale*, 2 Cox's R. 136.

(*f*) So said arguendo in *Barker* v. *Giles*, 2 P. Wms. 281. And in *Parteriche* v. *Pawlett*, 2 Atk. 55; alienatio rei præfertur juri accrescendi, is said to be a maxim in equity. But in *Cray* v. *Willes*, 2 P. Wms. 529, the Master of the Rolls observed, that a right by survivorship is as good as a right by descent; neither is there any thing unreasonable or unequal in the law of joint-tenancy, each having an equal chance to survive. See on this point, *Staples* v. *Maurice*, 7 Bro. P. C. 49; *Campbell* v. *Campbell*, 4 Bro. Ch. Rep. 15; *Morley* v. *Bird*, 3 Ves. 628; *Stewart* v. *Bruce*, 3 Ves. 361. As to affecting a tenancy in common by subsequent words, that would, per se, have created a joint-tenancy. See *Russell* v. *Long*, 4 Ves. 551. *Haws* v. *Haws*, 3 Atk. 524. 1 Eq. Ca. Ab. 292.

shall be subject to all the consequence of law; for, in favour of volunteers, there is no reason for equity to interpose (3); but as to a joint undertaking (*g*) in the way of trade, or the like, it is otherwise; and the

(3) *Jefferies* v. *Small*, 1 Vern. 217.

(*g*) If two take a lease jointly of a farm, the lease shall survive, but the stock on the farm, though occupied jointly, shall not survive; *Jefferies* v. *Small*, 1 Vern. 217.

If two persons advance a sum of money by way of mortgage, and take the mortgage to them jointly, and one of them dies, when the money is paid, the survivor shall not have the whole, but the representative of him who is dead shall have his proportion; *Petty* v. *Styward*, 1 Ch. Rep. 31.

If two or more purchase lands, and advance the money in equal proportions, and take a conveyance to them and their heirs, it is a joint-tenancy, that is, a purchase by them jointly of the chance of survivorship. But when the proportions of the money are not equal, and this appears in the deed itself, this makes them in the nature of partners; and however the legal estate may survive, yet the survivor shall be considered but as a trustee for the other, in proportion to the sums advanced by each of them. So if two or more make a joint purchase, and afterwards one of them lays out a considerable sum of money in repairs and improvements, and dies, this shall be a lien on the land, and a trust for the representative of him who advanced it. Per Master of the Rolls, *Lake* v. *Gibson*, 1 Eq. Ca. Ab. 291.

custom of merchants (*h*) is extended to all traders to exclude survivorship (4).

(4) *Lake* v. *Gibson*, 1 Eq. Ca. Ab. 290, 291.

(*h*) The rule is, jus accrescendi inter mercatores, pro beneficio commercii locum non habet. Co. Litt. 182, a.

SECTION III.

YET terms are admitted to attend the inheritance to protect it for purchasers (1); and this came up in Queen Elizabeth's reign, since the way of limiting terms in mortgage came in use (*i*). These trusts of

(1) *D. of Norfolk's* case, 8 Ch. Ca. 24.

(*i*) The creating of terms for the purpose of securing money lent on mortgage of the land, was with a view to obviate the inconveniences which were found to arise from the ancient way of making mortgages by charter of feoffment, with a condition of defeasance; for by such mode, if the condition was not performed, the estate becoming absolute was thenceforth subject to all the real charges and incumbrances of the feoffee, and, as some thought, to the dower of his wife. See 2 Bla. Com. 158. Powell on Mortgages, 7, 8. and the authorities there referred to. See also *Pawlett* v. *Attorney General*, Hard. 466. But whether the mortgage be created by way of feoffment or by a term for years, if the mortgage debt is not paid at the

terms attending on the inheritance, though entailed, were not within the statute de

time appointed, the estate mortgaged is absolutely forfeited to, and becomes the property of the mortgagee at law. But courts of equity permit the mortgagor to redeem, on payment to the mortgagee of his principal, interest, and costs; still this is merely a right in equity; the legal estate continuing in the mortgagee, the subsequent payment, though it give the mortgagor the equitable right to the estate, not affecting the legal continuance of the term. By an analogy to the case of mortgages, when terms of years are created for securing the payment of jointures or portions for children, or for any other purpose, they do not determine unless there be a special proviso, by the performance of the trusts for which they are raised. Thus in all these cases, the legal interest, during the continuance of the term, is in the trustee, but the owner of the fee is entitled to the equitable and beneficial interest. As courts of common law had determined, that the possession of the lessee for years was the possession of the owner of the freehold; courts of equity determined, that where the tenant for years was but a trustee for the owner of the inheritance, he should not oust his cestui que trust, or obstruct him in any act of ownership, or in making any assurances of his estate. In these respects, therefore, the term is consolidated with the inheritance: it follows the descent to the heir and all the alienations made of the inheritance, or of any particular estate or interest carved out of it, by deed, will, or act of law. *Whitchurch* v. *Whitchurch*, 2 P. Wms. 236. Gilb. Rep. 168. 9 Mod. 124. *Charlton* v. *Low*, 3 P. Wms. 330. *Villiers* v. *Villiers*, 2 Atk. 72. *Willoughby* v. *Willoughby*, Ambl. Rep. 282; but

donis, and may be aliened by the parties (*k*), but of terms in gross not, and therefore the judges would not admit of their being entailed (2). And a term attendant becomes in gross, when it fails of a freehold and inheritance to support it, or is divided from the inheritance by different limitations (*l*),

(2) *D. of Norfolk's* case, 3 Ch. Ca. 16. 24.

more fully reported, 1 Term Rep. 763. *Goodright* v. *Sales*, 2 Wils. 329. *Scott* v. *Fenhoulet*, 1 Bro. Ch. Rep. 69. But, though the trust or benefit of the term is annexed to the inheritance, the legal interest of the term remains distinct and separate from it at law; and the whole benefit and advantage to be made of the term arises from this separation, by affording the means of protecting bona fide purchasers of real estates, and also of enabling courts of equity to keep real estates in the right channel; courts of equity considering such terms as creatures of equity. See Mr. Butler's note, Co. Litt. 293, in which the utility of terms to attend the inheritance is explained and established. See also *Willoughby* v. *Willoughby*, Ambl. Rep. 282. *Nourse* v. *Yarworth*, Finch's Rep. 160.

(*k*) And as it seems, without fine or recovery. *D. of Norfolk's* case, 3, 10.

(*l*) Every term standing out, is at law a term in gross. If it is different in equity, it must be by affecting the person holding the term with a trust to attend the inheritance. This may be by two ways, by express declaration, or by implication of law. If the term is made attendant on the inheritance by express declaration, it is immaterial whether the term, if in the same

or the like (3). The trusts of a term in gross therefore can be limited no otherwise in equity than the estate of a term in gross can be devised in law (*m*); for they are not

(3) *D. of Norfolk's* case, 3 Ch. Ca. 24.

hand with the inheritance, would or would not have merged, or whether it be subject to some ulterior limitation, to which the inheritance is not subject, the express declaration will be sufficient to make it attendant on the inheritance. But if the term is to be made attendant on the inheritance by implication of law, then it is necessary that it should not be subject to any other limitation, and that the owner of the inheritance should be entitled to the whole interest in the trust of the term; so that according to the rule laid down in *Best* v. *Stamford*, Pre. Ch. 253. 2 Freem. 288; if the term and inheritance had been in the same hand, the term would have merged (as to the merger of terms, see c. 6. s. 8.); and the intent of the owner of the inheritance to purchase the whole interest in the term, will not, it seems, be sufficient to render the term attendant on the inheritance by implication of law. *Scott* v. *Fenhaullet*, 1 Bro. Ch. Rep. 69. But any limitation, though void in law, which shews an intention to sever the term from the inheritance, will be sufficient for such purpose. *Hayter* v. *Rod*, 1 P. Wms. 359. And therefore a term, though limited in trust for *A.* and his heirs, will devolve on the personal representative of *A.* *Hunt* v. *Baker*, 2 Freem. 62. See also 2 Freem. 131.

(*m*) A term may not only be limited to any number of persons successively for life, if all are in being at the time, but it may be limited to one for life, with remainder over to his first and other sons in tail, and for default of such issue, then to his daughters. *Massen-*

for setting up a rule of property in Chancery, other than that which is the rule of propriety at law(4). So that the rules are the same in equity in cases of trusts of terms, as in devises at common law(5) (*n*).

(4) Gilb. Uses, 189.

(5) Gilb. Uses, 24.

burgh v. *Ash*, 1 Vern. 234. *Higgins* v. *Dowler*, 1 P. Wms. 98. The result of the several decisions in support of the doctrine of these cases, is thus stated by Mr. Fearne, Ex. Dev. 407, "that whatever number of limitations there may be after the first executory devise of the whole interest, any of them which is so limited that it must take effect, if at all, within twenty-one years after the period of a life then in being, may be good in event, if no one of the preceding executory limitations which would carry the whole interest happens to vest; but when once any preceding executory limitation which carries the whole interest happens to take place, that instant all the subsequent limitations become void, and the whole interest is then become vested." See *Stanley* v. *Leigh*, 2 P. Wms. 686. *Studholm* v. *Hodgson*, 3 P. Wms. 300. *Brooks* v. *Taylor*, Mosely, 188. *Stephens* v. *Stephens*, Forrest. 288. *Gower* v. *Grosvenor*, Barnard, 54. *Doe* v. *Fonnereau*, Dougl. 470. *Marsh* v. *Marsh*, 1 Bro. Ch. Rep. 293. *Knight* v. *Ellis*, 2 Bro. Ch. Rep. 570. *Hockly* v. *Mawby*, 3 Bro. Ch. 82. But see *Clare* v. *Clare*, Forrest. 21. *Wyth* v. *Blackman*, 1 Ves. 196, 202.

(*n*) This refers to courts of law having borrowed from courts of equity the several principles which they now apply in the construction of the declarations of uses and executory devises. The principles which courts of law apply, in what they consider as equitable actions (trover, money had and received), are also drawn from courts of equity.

SECTION IV.

But a difference between a chattel and inheritance is a difference only in words, and not in reason or the nature of the thing; for the owner of a lease has an absolute power over his lease, as the owner of an inheritance over his estate; and where no perpetuity is introduced, nor any inconvenience does appear, there no rule of law is broken (1). A term may therefore be limited to twenty successively for life, if all in being together (*o*), because they must all

(1) Per Ld. C. Nottingham, 3 Ch. Ca. 32.

(*o*) In a former note I have referred to the origin and utility of long terms being made attendant on the inheritance. But by their operation the legal estate being separated from the beneficial interest, many inconveniences would have resulted from them, had not courts of equity interposed and laid down certain rules restrictive of the legal right of the trustee. Hence it became a rule in equity, that where the tenant for years is but a trustee for the owner of the inheritance, he shall not keep out his cestui que trust, nor pari ratione obstruct him in doing any act of ownership, or in making any assurances of his estate; and therefore in equity such a term for years shall yield and be moulded according to the uses, estates, or charges which the owner of the inheritance declares or carves out of the

wear out in a little time (2). And so it is a good limitation, where the contingency is circumscribed within the compass of a life, and one step further, viz. to the first son, though not in esse, at the time and twenty-one years afterwards (3). And so just and reasonable is this allowance to make provision for families, that where the common lawyers have complained that this court

(2) *Goring* v. *Bickerstaffe*, 1 Ch. Ca. 8.

(3) *Stephens* v. *Stephens*, Forrest. 288.

fee. Per Lord Chancellor Hardwicke, *Willoughby* v. *Willoughby*, 1 Term. Rep. 765. Courts of law feeling the reasonableness of this rule, allowed it to prevail as an exception to the general rule of law, which requires a plaintiff in ejectment to recover by the strength of a legal title; so that it is now established by many decisions, that even at law an estate in trust, merely for the benefit of the plaintiff cestui que trust, shall not be set up against him; any thing shall rather be presumed. *Goodtitle* v. *Knott*, Cowp. Rep. 46. *Doe* v. *Pott*, Dougl. Rep. 721. *Lade* v. *Holford*, Law of Nisi Prius, ed. 1775, p. 110. The rule as stated in *Goodtitle* v. *Knott*, requires the trust to be merely for the benefit of the plaintiff cestui que trust, which would confine its operation to cases of satisfied terms, or terms which had done their office, so far at least as the interest of third persons was involved. But in the case of *Doe*, on the dem. of *Bristowe*, v. *Pegge*, 1 Term Rep. 758, in a note, Lord Mansfield appears to have extended the application of the rule to the case of a confessedly unsatisfied outstanding term; the plaintiff admitting the charge, and claiming only subject to the incumbrances, and the trustees not asserting their title. This exten-

did encroach upon them, it may, on the contrary, be retorted, that they ought rather to cónfess themselves behólden to this court for their rules in equity.

sion of the rule was, however, by no means satisfactory; and accordingly, in the case of *Doe* v. *Staple*, 2 Term Rep. 698, it was by the opinion of three judges, Lord Kenyon C. J. Ashurst J. and Grose J. (dissentiente Buller J.) restrained within its former limits. See Sugden on vendors and purchasers, c. 17.

SECTION V.

And it is no strange notion at law, that long term for years should attend and wait on an inheritance; in which case they are to be governed and directed by the intention of the parties that created them (1): and when they have done their office, duty, and trust, and have borne the burthen, I mean, have raised the portions which were the original cause of their creation, then ought they in equity and conscience to

(1) Pre. Ca. 245.

cease and return back to the channel (2) from whence they were extracted (*o*). For it is a reason in law, that cessante causâ cessat effectus; and there is no original consideration to give them a longer being: so that such a term ought not to be made use of to any other purpose, especially to deprive a dowress of her dower (*p*). But these terms have been always looked upon as a good security to a purchaser against

(2) *Best* v. *Stamford*, Pre. Ch. 252. 2 Freem. 288. 1 Salk. 154. *Davidson* v. *Foley*, 2 Bro. Ch. Rep. 213.

(*o*) Unless it can be collected from the instrument, that the party raising the term intended to sever it from the inheritance. *Hayter* v. *Rodd*, 1 P. Wms. 360.

(*p*) It is now settled, though for some time controverted, that a dowress shall have the benefit of a satisfied term against the heir. *Dudley* v. *Dudley*, Pre. Ch. 241. *Higford* v. *Higford*, 1 Eq. Ca. Ab. 219. c. 5. *Duke of Hamilton* v. *Mohun*, 1 P. Wms. 121. *Williams* v. *Wray*, 1 P. Wms. 137. Butler's note (1). Co. Litt. 208. The cases in which this right of the dowress was denied, were, *Brown* v. *Gibbs*, Pre. Ch. 97. *Wray* v. *Williams*, before Lord Keeper Wright, Pre. Ch. 151. A dowress may also, though not dowable of an equity of redemption of a mortgage in fee, *Dixon* v. *Saville*, 1 Bro. Ch. Rep. 326, redeem a mortgage for years, and hold over against an heir till satisfied; *Palmes* v. *Danby*, Pre. Ch. 137. Powell on Mortgages, 99; but not against a purchaser; *Swannock* v. *Lyford*, Ambl. Rep. 6.

dower, though the purchase was with notice (*q*).

(*q*) It certainly does appear, in the report of the cases of *Lady Radnor* v. *Rotherham*, Pre. Ch. 65, that the purchaser had, at the time of the purchase, notice of the marriage of the vendor, and that notwithstanding such circumstance, Lord Chancellor Somers refused to subject his purchase to the dower of the wife of the vendor; such also may be collected to have been the opinion of Lord Hardwicke, in giving judgment in the case of *Hill* v. *Adams*, as reported in 2 Atk. 208. And Mr. Butler's additional note, Co. Litt. 208, b, where the judgment of Lord Hardwicke is stated from a MS. note. But the term must be actually assigned, see *Maundrell* v. *Maundrell*, 7 Ves. 567. 10 Ves. 246. But if these decisions bear out the proposition, that a purchaser with notice of the wife's title to dower may defeat it, they are at least exceptions to the general principle of equity, which refuses protection even to purchasers against a present or eventual right in another of which they had notice. See *Wynn* v. *Williams*, 5 Ves. 130.

SECTION VI.

But it is said, that if the term be not expressly declared in the assignment to be attendant on the inheritance, but is so only

by construction in equity, it shall in equity be assets for the payment of debts, but the heir shall have the surplus (1); and so the difference that had been formerly taken in this case between legal and equitable assets, has been exploded (*r*). Yet the law seems now otherwise; for a term in the owner is assets at law, but a term in trust is not to be made assets in equity (*s*), and it would be dangerous to purchasers to make it so (2). Neither shall the custom of London prevent the attendance of a lease on the inheritance, though there was no declaration of trust (*t*), that it should be attendant (3);

(1) *Chapman* v. *Bond*, 1 Vern. 188, 189.

(2) *Tiffin* v. *Tiffin*, 1 Vern. 1. 341. *Baden* v. *E. of Pembroke*, 2 Vern. 52. 3 Ch. Rep. 116.

(3) *Dowse* v. *Derivell*, 1 Vern. 104.

(*r*) The only distinction upon this point is, whether the term be in gross or attendant on the inheritance: if the term be in gross, it is personal assets; if the term be in a trustee, and attendant on the inheritance, it is real assets; in both cases the assets are legal. What constitutes difference between legal and equitable assets will be considered, B. 4. pt. 2. c. 2. s. 1.

(*s*.) Such a term is, however, real assets in the hands of the heir; for the statute of frauds having made a trust in fee assets in the hands of the heir, the term which follows the inheritance, and which is subject to all charges which affect the inheritance, must be so also. See *Attorney General* v. *Sir G. Sandys*, Hard. 489. *Willoughby* v. *Willoughby*, 1 Term Rep. 766.

(*t*) If the implication that the term should attend the

so if a feme covert hath such a term (4), it shall not survive to the husband (*u*). Indeed if a man purchases an inheritance in the name of trustees, and takes a mortgaged term carved out of such inheritance in his own name, in order to protect the inheritance, such term will be liable to the payment of his debts, because it still remains as a chattel in him (5): but if they are both in the name of other persons, there is no difference in reason, whether he had the term or inheritance first in him; but the heirs are to have the lease to attend the inheritance (6).

(4) *Best* v. *Stamford*, Pre. Ch. 254. 1 Salk. 154.

(5) *Tiffin* v. *Tiffin*, 2 Ch. Ca. 49. 1 Vern. 1.

(6) *North* v. *Langton*, 2 Ch. Ca. 156. 2 Ch. Rep. 140.

inheritance be raised, all the consequences incidental to a term expressly declared attendant, will necessarily attach. See *Willoughby* v. *Willoughby*, 1 Term Rep. 766. *Charlton* v. *Low*, 3 P. Wms. 328.

(*u*) In the case of *Best* v. *Stamford*, the wife survived the husband, and it does not appear that he had made any disposition, nor indeed could he, having consented to the creation of the term. I am, however, inclined to think, that the position is within the principle which governs terms attendant on the inheritance.

CHAP. V.

Of Uses raised by Operation of Law.

SECTION I.

BUT we must examine more particularly to whom the use shall be by operation of law (*a*), where there is either no declaration, or but in part only, and here it is a general rule, that the trust results to the party from

(*a*) By the statute of frauds, as before observed, B. 2. c. 2. s. 4, all declarations of trusts of lands, &c. are required to be in writing; but there is an express saving of trusts arising by implication of law; see *Cottingham* v. *Fletcher*, 2 Atk. 155, and transferred or extinguished by operation of law; which trusts are declared to remain and be of the same force and effect as before the statute. Upon which, Lord Hardwicke, in the case of *Lloyd* v. *Spillet*, 2 Atk. 150, observes, that he was bound by the statute of frauds to construe nothing a resulting trust but what are there called trusts by operation of law; which are, first, when an estate is purchased in the name of one person, but the money or consideration is given by another; or secondly, where a trust is declared only as to part and nothing said as to the rest, what remains undisposed of results to the heir at law,

whom the consideration or estates moved (1). As first, in case of a purchase, where a man buys land in another's name, and pays the money (2), it will be in trust for him that

(1) *Pelly* v. *Madden*, 21 Vin. Ab. 498. pl. 15.

(2) *Anon.* 2 Ventr. 361.

Gascoyne v. *Theving*, 1 Vern. 366. *Lloyd* v. *Spillett*, 2 Atk. 150. *Smith* v. *Baker*, 1 Atk. 385.

and they cannot be said to be trustees for the residue. "I do not know," adds his Lordship, "any other instance besides these two, where this Court has declared resulting trusts by operation of law, unless in cases of fraud, and where transactions have been carried on malâ fide." This construction of the above clauses of the statute of frauds restrains it to such trusts as arise by operation of law, except in cases of fraud, whereas it clearly extends to such as are raised by construction of courts of equity; as in the case of an executor or guardian renewing a lease, though with his own money, such renewal shall be deemed to be in trust for the person beneficially interested in the old lease. *Holt* v. *Holt*, 1 Ch. Ca. 191. *Whalley* v. *Whalley*, 1 Vern. 484. Saunders on Uses, 240. It is also observable, that the first instance stated by his Lordship of a resulting trust is not so qualified as to let in the exceptions to which the general rule, as our author properly terms it, is subject; and the second instance is only applicable to a will, whereas the doctrine of resulting trusts is equally applicable to conveyances. But in the case of a conveyance, it is by no means universally true, that what is not conveyed will result; as where the grantor limits an estate for years to himself, and an estate to another, by way of use, upon a contingency which may not happen within the term of years, an estate of freehold will not result to the grantor. That a voluntary conveyance does not imply a trust, see *Young* v. *Peachy*, 2 Atk. 256.

pays the money (*b*). So where one of the three, that held a lease under the dean and chapter, surrenders the old lease, and takes a new one to himself (3), this shall be a trust for all (*c*). But although in the pur-

(3) *Palmer* v. *Young*, 1 Vern. 276.

Lord Hardwicke's view of the subject of resulting trusts seems also defective, as it is confined to cases where only part of the use is disposed of, or conveyed; whereas though the whole of the estate be conveyed, if it be for particular purposes, or on particular trusts, which by accident or otherwise cannot take effect, a trust will result; as where the testator devises real estates to trustees in trust to sell and apply the purchase money, in a particular manner, and such purpose cannot be effectuated, the fund, though money, will be considered as land, and will result to the heir at law. *Cruse* v. *Barley*, 3 P. Wms. 20. *Randall* v. *Bookey*, Pre. Ch. 162. *Emblyn* v. *Freeman*, Pre. Ch. 541. *Stonehouse* v. *Evelyn*, 3 P. Wms. 252. *Digby* v. *Legard*, Trin. 1774. *Akeroid* v. *Smithson*, 1 Bro. Ch. Rep. 503. *Robinson* v. *Taylor*, 2 Bro. Ch. Rep. 589. *Spink* v. *Lewis*, 3 Bro. Ch. Rep. 355; but such fund is personal estate of the heir, and as such will go to his executor; *Hewett* v. *Wright*, 1 Bro. Ch. Rep. 86. *Hill* v. *Bowyer*, Rolls, 26 June, 1795. *Levatt* v. *Redham*, 2 Vern. 138. *Wright* v. *Wright*, 16 Ves. 191. 12 Ves. 413, 10 Ves. 500. *Cole* v. *Wade*, 16 Ves. 27, 45.

(*b*) This position is subject to the exceptions stated in the following section.

(*c*) So if a trustee purchase lands with his trust money, and take the conveyance in his own name without declaring the trust, but reciting or otherwise admitting that the purchase was made with the profits of the trust

chase deed, the consideration-money is mentioned to be paid by the purchaser, and there is no express declaration of a trust; yet it appearing upon the face of the deeds to be a trust for an infant heir in pursuance of marriage articles, and the purchaser at the courts he held declared it was his son's estate, it shall be decreed a trust for him, though to the disappointment of the purchaser's will, and of his creditors. For though creditors are favourites, yet we must not pay them out of other men's estates; nor, as Justice Twysden said, steal leather to make poor men's shoes (4).

(4) *E. of Plymouth* v. *Hickman*, 2 Vern. 167

estate, a trust will clearly result for the person who was entitled to the profits. *Deg* v. *Deg*, 2 P. Wms. 414. But it was once doubted whether any thing short of the admission of the trustee, that the purchase was made with trust money, will be sufficient to raise a trust in favour of the cestui que trust. *Kirk* v. *Webb*, Pre. Ch. 84. *Newton* v. *Preston*, Pre. Ch. 103. *Kendar* v. *Milward*, 2 Vern. 440. It has, however, been held in more modern cases, that evidence *aliunde* is admissible, to shew that the purchase was made with trust money, and that upon such fact being clearly proved, a trust will result. *Balguey* v. *Hamilton*, *Ryal* v. *Ryal*, cited in *Lane* v. *Dighton*, Amb. Rep. 409. And in *Sowden* v. *Sowden*, 1 Bro. Ch. Rep. 582. 1 Cox's R. 166, the court appears to have gone one step further, and to have presumed that the land was by the settler purchased in execution of the trust, as

the trustee was to have laid the money out in the purchase of land. See also *Lechmere* v. *Lechmere*, Forrest. 80, and *Wilson* v. *Foreman*, Dick. 593. But in a later case, *Perry* v. *Philips*, 4 Ves. 108, Lord Loughborough, C. though he recognized the authority of *Sowden* v. *Sowden*, and observed that the "ground of that determination was, that the trustee must be presumed in making the purchase to have intended to fulfil his obligation," stated that "he could find no case, no authority, or principle that entitled him where there is not a ground of presumption; where in point of fact he must be satisfied that the party did not mean to execute the trust, or conceived himself to be under a trust to hold that the estate he purchased was subject to the trust." From this observation it may be collected, that in his Lordship's opinion, it is not only necessary that the trustee be under an obligation to purchase land, but also that he be apprized of such obligation, and that nothing appears to rebut the presumption of his intention to discharge it. It would ill become me to do more than to suggest that by this construction the estate of a trustee may be benefited, either by his ignorance of his duty, or fraud in the discharge of it; and that it would perhaps be as consistent with the general spirit and policy of our equitable system, not to allow the plea of ignorance or fraud to be urged in support of a benefit to be derived from either; but, to conclude, that where a man is bound to do an act, and he does what may enable him to do the act, that he does it with the view of doing that which he was bound to do, or at least not to permit him in a court of conscience to aver the contrary.

SECTION II.

AND if a father purchase lands, &c. in the name of a son unadvanced, it is an advancement for him, not a trust (1); for the father is bound by the law of nature to provide for his children (*d*), and Chancery will compel him (*e*), if they are destitute,

(1) *Lord Gray* v. *Lady Gray*, 1 Ch. Ca. 296. *Scroop* v. *Scroop*, 1 Ch. Ca. 27, 28. *Mumma* v. *Mumma*, 2 Vern. 19. *Jenning* v. *Sellack*, 1 Vern. 467. *Shales* v. *Shales*, 2 Free. 252. Gilb. Uses, 350. *Bateman* v. *Bateman*, 2 Vern. 436. *Taylor* v. *Taylor*, 1 Atk. 386. *Stileman* v. *Ashdown*, 2 Atk. 480.

(*d*) The moral obligation which attaches to the parent to provide for his children, is the foundation of this rule; it must therefore be considered as confined to those cases in which the child is not otherwise provided for, see margin (3), and must not be allowed to break in upon the legal rights of others. Therefore though where a father purchases in the joint names of himself and a child otherwise unprovided for, and the father dies, the child shall have the benefit of survivorship against the heir, and all persons claiming as volunteers under, or even as purchasers with notice from the father; *Scroop* v. *Scroop*, 1 Ch. Ca. 27. *Back* v. *Andrews*, 2 Vern. 120. *Dyer* v. *Dyer*, 2 Cox's Rep. 92. *Finch* v. *Finch*, 15 Ves. 43; yet he shall not have such benefit of survivorship against creditors. *Stileman* v. *Ashdown*, 2 Atk. 480. As to a purchaser in the name of a person, not a wife or child, see *Rider* v. *Kidder*, 10 Ves. 360.

(*e*) Whether the court of Chancery ever had the

and not able to maintain themselves. But if the trust is declared before, or at the time of the purchase (2): or the father has already provided for him (3); or the whole estate is not given him (*f*), but part of it to another; or if he were of full age (4), and the father acts as proprietor, or does any thing which implies him to be owner of the land; this shall over-rule the presumption of law in favour of him (*g*). As to the

(2) *Elliot* v. *Elliot*, 2 Ch. Ca. 231.
(3) *Elliot* v. *Elliot*, 2 Ch. Ca. 231. *Lloyd* v. *Read*, 1 P. Wms. 608. *Pole* v. *Pole*, 1 Ves. 76.
(4) *Lloyd* v. *Read*, 1 P. Wms. 608. *Attorney General* v. *Bagg*, Hard. 125.

power here ascribed to it may be doubted, the legislature having conferred such power on the Lord Chancellor, where a Popish or Jewish parent refuses to allow his Protestant child a suitable maintenance, 11 and 12 Wm. III. c. 4. § 7. and 1 Anne, St. 1. c. 30; and with respect to parents in general, the manner in which they shall discharge this natural obligation towards their children is pointed out by 43 Eliz. c. 2. As to the jurisdiction of Chancery in such cases, see B. 2. pt. 2, c. 2. § 1.

(*f*) The case referred to is probably *Baylis* v. *Newton*, 2 Vern. 28; but the report is so confused, that it is not a direct authority for the distinction here stated.

(*g*) The case of *Mumma* v. *Mumma*, 2 Vern. 19, is reconciled with this distinction; the circumstance of the child's infancy, and the decision of the court, in *Back* v. *Andrews*, 2 Vern. 120, and *Scroop* v. *Scroop*, 1 Ch. Ca. 27, must be referred to the purchase being in the joint names of the father and child, which gave the father an equal right to the possession, &c. See

grandfather, there is a difference in the case, where the father is dead, and where he is still living; for when the father is dead, the grandchildren are in the immediate care of the grandfather (*h*). And therefore if he takes bonds in their names, or makes leases to them, they shall not be adjudged as trusts, but as a provision for the grandchild, unless it be otherwise declared at the same time (5). But this is to be understood only of legitimate children; for of a bastard or reputed child the law takes no notice (*i*).

(5) *Ebrand* v. *Dancer*, 2 Ch. Ca. 26. 43 Eliz. c. 2.

Taylor v. *Taylor*, 1 Atk. 586. As to evidence of the father's intention, see *Murless* v. *Franklin*, 1 Swanston's Rep. 13.

(*h*) But though the grandfather be bound to provide for his grandchildren after the death of their father, courts of equity, it seems, will not assist him in the discharge of this moral and legal obligation, and therefore will not supply the want of a surrender on behalf of a grandchild; *Kettle* v. *Townsend*, 1 Salk. 187; *Tudor* v. *Anson*, 2 Ves. 582. But see *Elton* v. *Elton*, 3 Atk. 508; whence it might be inferred, that Lord Hardwicke thought a grandfather not morally bound to provide for his grandchild.

(*i*) Though to any civil purposes bastards are not looked upon as children, yet, as the ties of nature cannot be dissolved, their parents are bound to maintain them; and I have not been able to find any case which

renders them incapable of taking a gift from their parents, provided they be sufficiently described; see *Wilkinson* v. *Adam*, 1 Ves. & B. 423; such an incapacity indeed appears to have prevailed in the civil law, Cod. 6. 57, 5, but has never been adopted by the law of England. They are, from reasons of civil policy, incapable of inheriting, but not of taking by devise, if they have acquired a name by reputation. They are not considered as children for whom the consideration of blood would raise an use; yet on an estate otherwise effectually passed, an use may be as well declared to a bastard being *in esse*, and sufficiently described, as to any other person. See Mr. Hargrave's note (8), Co. Litt. 123, a. Courts of equity will not indeed supply the want of a surrender of a copyhold estate, on behalf of a bastard; *Fursaker* v. *Robinson*, Pre. Ch. 475; neither will courts of equity supply the want of a surrender in favour of a grandchild; see B. 1. c. 1. § 7, note (*s*). Yet the natural obligation which the grandfather is under to provide for his otherwise destitute grandchildren, has been deemed in equity a sufficient consideration to rebut the resulting trust to the grandfather; whence then the objection to a natural child's receiving equal favour? The natural obligation of a parent to maintain his illegitimate offspring is incontrovertible. See Puff. Law of Nature and Nations, b. 4. c. 11. § 6. But it may be said, that though a bastard may take by direct gift from his parent, yet the law will not imply a gift in his favour. In those cases in which the conveyance, being taken in the name of a child, is held an advancement for, and not a trust in the child, the principle is, that the parent was bound to provide for the child, and having directed the conveyance to be in his name, is presumed to have intended to discharge such moral duty. If such be the principle,

it will follow, that wherever such obligation exists in the parent, the beneficial interest shall enure to the child. The obligation does extend to an illegitimate child, and consequently I should conceive him to be within the principle, and entitled to the benefit.

SECTION III.

So the wife cannot be a trustee for the husband; but if the husband purchase in her name, it shall be presumed to be an advancement and provision for her (1). And the law is the same, where the purchase is to himself, his wife and daughter, and their heirs (2); or of money lent on mortgages and bonds in their names. Yet in case of creditors it may be fraudulent as to them (3), unless the purchase is made in pursuance of articles before the marriage, or as a settlement upon the wife upon her marriage. And by the same reasoning it is, that where a wife is made executrix, it is to be presumed that she is not so appointed to have barely an office of trouble, but of benefit, to take the surplus (4), although

(1) *Kingdome* v. *Bridges*, 2 Vern. 67.

(2) *Back* v. *Andrews*, 2 Vern. 120.

(3) *Christ's Hospital* v. *Buding*, 2 Vern. 683.

(4) *Ball* v. *Smith*, 2 Vern. 675.

she has a special legacy given her (*i*); and this is not a devise, but in nature of an exception. But otherwise of a stranger made executor, who has a particular legacy, there it implies a trust of the surplus (3). Yet the executor hath the entire right both in law and equity, unless by some such circumstances it appears that the testator intended the contrary; for it cannot be intended that a man makes a will with intent to die intestate (*k*); and parol proof ought

(3) *Foster* v. *Munt*, 1 Vern. 478.

(*i*) This decision is referred by Mr. Peere Williams to the reversal of Lord Cowper's decree by the House of Lords, in the case of *Lord Granville* v. *Duchess of Beaufort*, 1 P. Wms. 114. But as that reversal proceeded on an allegation that the decree in *Foster* v. *Munt* was grounded on the fraud, and the wills being drawn at a tavern, which allegation afterwards appeared to be unfounded, the authority of *Foster* v. *Munt* is restored, and the case of *Ball* v. *Smith* has been overruled; and it is now settled that a wife appointed executrix is, as to the residue, precisely in the situation of any other person appointed executor or executrix; *Lake* v. *Lake*, Ambl. 126; *Gobsall* v. *Sounden*, 2 Eq. Ca. Ab. 444. pl. 58; *Martin* v. *Rebow*, 1 Bro. Ch. Rep. 154; unless the legacy to her being specific, consist of property which was her's before marriage, which circumstance may vary the rule; *Lawson* v. *Lawson*, 7 Bro. P. C. 511: see also *Hansley* v. *Finch*, 2 Ves. 280.

(*k*) By law, the appointment of an executor vests in

to be received in favour of an executor's title (*l*), consistent with the will (6).

(6) *Petit* v. *Smith*, 1 P. Wms. 7. *Lady Glanville* v. *Duchess of Beaufort*, 1 P. Wms. 114. *Gainsborough* v. *Gainsborough*, 2 Vern. 252. *Littlebury* v. *Buckley*, cited 2 Vern. 677. *Bachelor* v. *Searle*, 2 Vern. 736. *Duke of Rutland* v. *Duchess of Rutland*, 2 P. Wms. 210. *Mallabar* v. *Mallabar*, Forrest. 78. *Lake* v. *Lake*, 1 Wils. 313. Amb. 126. *Brown* v. *Selwyn*, Forrest. 240.

him all the personal estate of his testator, and if any surplus remain after payment of funeral expences and debts, such surplus will belong to the executor. But in equity, if it can be collected from any circumstance or expression in the will, that the testator intended his executor only the office, and not the beneficial interest, such intention shall receive effect, and the executor shall be deemed a trustee for those on whom the law would have cast the surplus in cases of a complete intestacy. The cases upon the subject are numerous, and not easily reconcileable. I will, however, endeavour to extract the several rules which have governed their decision.

1. As the exclusion of the executor from the residue is to be referred to the presumed intention of the testator that he should not take it beneficially, an express declaration that he should take as trustee will of course exclude him; *Pring* v. *Pring*, 2 Vern. 99; *Graydon* v. *Hicks*, 2 Atk. 18; *Wheeler* v. *Sheers*, Mosely, 288, 301; *Dean* v. *Dalton*, 2 Bro. Ch. Rep. 634; *Bennet* v. *Bachelor*, 3 Bro. Ch. 28. 1 Ves. jun. 63; and the exclusion of one executor as a trustee will consequently exclude his co-executor; *White* v. *Evans*, 4 Ves. 21; unless there be evidence of a contrary intention, *Williams* v. *Jones*, 10 Ves. 77; *Pratt* v. *Sladden*, 14 Ves. 193; *Dawson* v. *Clark*, 15 Ves. 416; and see *Dalton* v. *Dean*, to shew that direction to reimburse the executors their expences, is sufficient to exclude them; 2 Bro. Rep. 634.

2. Where the testator appears to have intended by his will to make an express disposition of the residue but by some accident or omission such disposition is not perfected at the time of his death, as where the will contains a residuary clause, but the name of the residuary legatee is not inserted, the executor shall be excluded from the residue. *Bp. of Cloyne* v. *Young*, 2 Ves. 91; *Lord North* v. *Purdon*, 2 Ves. 495; *Hornsby* v. *Finch*, 2 Ves. jun. 78; *Oldham* v. *Carleton*, 2 Cox's R. 400.

3. Where the testator has by his will disposed of the residue of his property, but by the death of the residuary legatee, in the life-time of the testator, it is undisposed of at the time of the testator's death. *Nichols* v. *Crisp*, Amb. 769; *Bennett* v. *Bachelor*, 3 Bro. Ch. Rep. 28.

4. The next class of cases in which an executor shall be excluded from the residue, is, where the testator has given him a legacy expressly for his care and trouble: which, as observed by Lord Hardwicke, in *Bp. of Cloyne* v. *Young*, 2 Ves. 97, is a very strong case for a resulting trust, not on the foot of giving all and some, but that it was evidence that the testator meant him as a trustee for some other for whom the care and trouble should be, as it could not be for himself; *Foster* v. *Munt*, 1 Vern. 473; *Rachfield* v. *Careless*, 2 P. Wms. 157; *Cordel* v. *Noden*, 2 Vern. 148; *Newstead* v. *Johnstone*, 2 Atk. 46.

5. Though the objection to the executor's taking part and all has been thought a very weak and insufficient ground for excluding him from the residue, as the testator might intend the particular legacy to him in case of the personal estate falling short, yet it has been

allowed to prevail, and it is now a settled rule in equity, that if a *sole* executor has a legacy generally and absolutely given to him, (for if under certain limitations, which will be hereafter considered, it will not exclude,) he shall be excluded from the residue; *Cook* v. *Walker*, cited 2 Vern. 676. *Joslin* v. *Brewet*, Bunb. 112. *Davers* v. *Dewes*, 3 P. Wms. 40. *Farringdon* v. *Knightly*, 1 P. Wms. 544. *Vachell* v. *Jefferies*, Pre. Ch. 170. *Petit* v. *Smith*, 1 P. Wms. 7. Nor will the circumstance of the legacy being specific be sufficient to entitle him; *Randall* v. *Bookey*, 2 Vern. 425. *Southcot* v. *Watson*, 3 Atk. 226. *Martin* v. *Rebow*, 1 Bro. Ch. Rep. 154. *Nesbitt* v. *Murray*, 5 Ves. 149; nor will the testator's having bequeathed legacies to his next of kin vary the rule; *Bayley* v. *Powell*, 2 Vern. 361. *Wheeler* v. *Sheers*, Mosely, 288. *Andrew* v. *Clark*, 2 Ves. 162. *Kennedy* v. *Stainsby*, E. 1755, stated in a note. 2 Ves. jun. 66; for the rule is founded rather on a presumption of intent to exclude the executor, than to create a trust for his next of kin, and therefore if there be no next of kin, a trust shall result for the crown. *Middleton* v. *Spicer*, 1 Bro. Ch. Rep. 201.

6. Where the testator appears to have intended to dispose of any part of his personal estate, *Urquhart* v. *King*, 7 Ves. 225.

7. Where the residue is given to the executors as tenants in common, and one of the executors dies, whereby his share lapses, the next of kin, and not the surviving executors, shall have the lapsed share. *Page* v. *Page*, 2 P. Wms. 489, 1 Ves. jun. 66. 542.

With respect to co-executors, they are clearly within the three first stated grounds on which a sole executor shall be excluded from the residue. And as to the

fourth ground of exclusion, it seems to be now settled that a legacy given to one executor expressly for his care and trouble, will, though no legacy be given to his co-executor, exclude. *White* v. *Evans*, 4 Ves. 21. As to the fifth ground of exclusion of a sole executor, several points of distinction are material in its application to co-executors. A sole executor is excluded from the residue by the bequest of a legacy, because it shall not be supposed that he was intended to take part and all. But if there be two or more executors, a legacy to one is not within such objection, for the testator might intend a preference to him pro tanto. *Colesworth* v. *Brangwin*, Pre. Ch. 323. *Johnson* v. *Twist*, cited 2 Ves. 166. *Buffar* v. *Bradford*, 2 Atk. 220. So where several executors have unequal legacies, whether pecuniary or specific, they shall not be thereby excluded from the residue. *Brasbridge* v. *Woodroffe*, 2 Atk. 69. *Bowker* v. *Hunter*, 1 Bro. Ch. Rep. 328. *Blinkhorn* v. *Feast*, 2 Ves. 27. But where equal pecuniary legacies are given to two or more executors, a trust shall result for those on whom, in case of an intestacy, the law would have cast it. *Petit* v. *Smith*, 1 P. Wms. 7. *Carey* v. *Goodinge*, 3 Bro. Ch. Rep. 110. *Muckleston* v. *Brown*, 6 Ves. 64. But see *Heron* v. *Newton*, 9 Mod. 11. Qu. whether distinct specific legacies of equal value to several executors, will exclude them?

It now remains to consider in what cases an executor shall not be excluded from the residue; upon which it may be stated as an universal rule, that a court of equity will not interfere to the prejudice of the executor's legal right, if such legal right can be reconciled with the intention of the testator, expressed by or to be collected from his will; and therefore even the bequest of a legacy to the executor shall not exclude, if

such legacy be consistent with the intent, that the executor shall take the residue; as where a gift to the executor is an exception out of another legacy. *Griffith* v. *Rogers*, Pre. Ch. 231. *Newstead* v. *Johnstone*, 2 Atk. 45. *Southcot* v. *Watson*, 3 Atk. 229. Or where the executorship is limited to a particular period, or determinable on a contingency, and the thing bequeathed to the executor upon such contingency taking place, is bequeathed over. *Hoskins* v. *Hoskins*, Pre. Ch. 263. Or where the gift is only a limited interest, as for the life of the executor. *Lady Granville* v. *Duchess of Beaufort*, 1 P. Wms. 114. *Jones* v. *Westcombe*, Pre. Ch. 316. *Nourse* v. *Finch*, 1 Ves. jun. 356, or where the wife be executrix, the bequest be of her paraphernalia. *Lawson* v. *Lawson*, 7 Bro. P. C. 521. *Ball* v. *Smith*, 2 Vern. 675.

(*l*) That parol evidence is admissible for the purpose of rebutting a resulting trust, is incontrovertibly established by the several cases referred to in the margin; but it is said, in several cases, that it ought to be admitted with great caution; *Duke of Rutland* v. *Duchess of Rutland*, 2 P. Wms. 215. *Rachfield* v. *Careless*, 2 P. Wms. 160. *Blinkhorn* v. *Feast*, 2 Ves. 28. *Nourse* v. *Finch*, 1 Ves. jun. 359; and restricted to what passed at the time of making the will. *Duke of Rutland*, v. *Duchess of Rutland*, 2 P. Wms. 315. *Nourse* v. *Finch*, 1 Ves. jun. 359. Such restriction would indeed, under some circumstances, be extremely proper; as if the testator, at the time of making his will, declared, that his executor should or should not have the residue, such declaration ought not to be controverted by contrary declarations made prior or subsequent to the making of the will. But supposing no conversation to have been had respecting the residue at the time of making the will, but subsequent thereto the testator had declared that

he had and intended, by appointing A. his executor, to give him the residue; should evidence of such the testator's construction of his appointment of A. to be his executor be rejected? the testator's construction in such case would be strictly correct, with reference to the rule of law, which is, that the executor shall take every thing not disposed of; and with the reasoning of courts of equity, which qualifies the legal right, the testator might be, and such declaration would shew he actually was, wholly unacquainted. To reject evidence explanatory of the testator's intention would, under such circumstances, wholly defeat it, and that, in order to enforce a rule of equity which professes to effectuate the testator's intention.

With respect to evidence of declarations prior to the making of the will, unless in the shape of instructions for such purpose, they are, in certain cases, obviously entitled to less respect than declarations made at the time of, or subsequent to the making of the will; for whatever might be the intention at the time of the declaration, it might have been varied, or been wholly abandoned, at the time of making the will. The greatest circumspection is, therefore, due, in receiving evidence of declarations prior to the making of the will; unless, as before observed, they were intended as directions of instructions for such purpose. See *Clannell* v. *Lewthwaite*, 2 Ves. jun. 473, and the cases there considered. See also *Trimmer* v. *Bayne*, 7 Ves. 508. *Langham* v. *Sanford*, 17 Ves. 443. As to evidence by the next of kin, see *White* v. *Williams*, 3 Ves. & B. 72.

SECTION IV.

THE second sort of resulting uses are upon conveyances. For every man that hath lands, hath thereby two things in him; the one the possession of the land, which in the law of England, is called the freehold; and the other, the authority to take the profits of the land, which is the use (1). And, therefore, where there is a feoffment to particular uses, the residue of the use shall be to the feoffor (*m*); for the raising

(1) Co. Lit. 23, a. 271, b. Saunders on Uses, 127. et seq.

(*m*) I have already had occasion to refer to the doctrine of resulting uses, where no consideration or declaration of the use appears on the conveyance, and the principle upon which an use will result in those cases, namely, that so much of the use as a man does not dispose of remains in him, extending to cases where a man makes a feoffment, or other conveyance, and parts with, or limits only, a particular estate, and leaves the residue undisposed of, it follows, that where there is a feoffment to particular uses, the residue of the use shall be to the feoffor, and that although the feoffment be made for a consideration; for it is the intent that guides the use; and here the feoffor expressly declaring a particular estate of the use, it shews that if he intended to depart with the residue, he would have declared that intention also; but in this particular, a distinction is observable, where there is a consideration,

those particular estates appears a sufficient consideration for making the conveyance. And there is no great difference (*n*) between

though purely nominal, and no use is declared, and where some part of the use is declared; for in the first case, no use will result to the feoffor, the payment of even a nominal consideration shewing an intent that the feoffees should have the use; whereas, in the latter case, the consideration will be referred to the particular uses declared, and the residue of the use will result. *Shortridge* v. *Lamplugh*, 2 Ld. Raym. 798. 7 Mod. 71. 2 Salk. 678. *Lloyd* v. *Spillet*, 2 Atk. 148. Barnard, 384.

(*n*) One difference between a feoffment to uses, and a covenant to stand seised, is, that in a covenant to stand seised to uses, not only so much as the covenantor does not dispose of remains in him, but also such uses as do not or cannot take effect; as if A. covenant, in consideration of blood, to stand seised to the use of B. his son, for life, and in consideration of 1,000 *l.* to stand seised to the use of C. in fee, after the death of B., and B. refuse the use, A. shall retain, and C. shall not take immediately; whereas, if A. had made a feoffment to the use of B. for life, and after to the use of C. for life, and B. refused, in that case C. should take his estate presently. The reason of which distinction is, that in the latter case, the feoffor by his feoffment, hath put the whole estate out of him, and all the uses are created out of it, as out of one and the same root; and, therefore, so long as any of the uses can take effect, the feoffor shall not meddle with the land; but, in the former case of a covenant raising an use, there the consideration, which is the cause which raises every several use, is several, and all the uses grow and arise out of

a feoffment to uses, and a covenant to stand seised; for so much as he does not dispose of remains in him as the ancient use in both cases, although in the one, there is a transmutation of the possession, and in the other not (2). So that there seems no resulting use or occasion for a priority of an instant, (viz.) that it should first vest, and then return (3). But there is a difference, where he who has the use limits it to A. for life, remainder to the heirs of the body of B.; here no estate can arise to B., because nothing moved from him: otherwise, if the limitation is to the heirs of his own body (4), there, ut res magis valeat he shall have it for his life (*o*). And although an estate

(2) *Pybus* v. *Mitford*, 1 Vent. 372.

(3) *Pybus* v. *Mitford*, 1 Ventr. 375, 376.

(4) *Pybus* v. *Mitford*, per Lord Hale, 1 Ventr. 378.

1 Mod. 98. *Davis* v. *Speed*, 4 Mod. 153.

the estate of the covenantor; and, therefore, if one refuses, he who is next in remainder shall not take presently, but the covenantor shall keep it. *Rector of Chedington's* case, 1 Rep. 154, b. *Lord Paget's* case, 1 Leon. 200. As to the difference between a covenant to stand seised to use, and a conveyance at common law, see *Southcot* v. *Stowell*, 2 Mod. 207.

(*o*) See *Southcot* v. *Stowell*, 2 Mod. 211, where this point is doubted, and Fearne's Ess. Cont. Rem. 30, 33. where it is supported, and the difference between the case stated to be, that in *Pybus* v. *Mitford*, the covenantor had not limited any use during his own

cannot arise by implication in a deed, even by way of use, and a man cannot convey to himself (5), yet a man may qualify an estate that is in him (6). But if a man covenant to stand seised to such uses, as that he should leave a descendible estate in himself, as to the use of his son from and after his marriage, or to the use of J. S. after forty years; these are not to be resembled to the cases where the precedent estates cannot continue longer than his life (*p*); and this without any wrong done to any rule of law, may be turned to an use for life, and therefore such construction shall be (7).

(5) *Pybus* v. *Mitford*, 1 Ventr. 379.

(6) *Lane* v. *Pannell*, 1 Roll's Rep. 239. *Southcot* v. *Stowell*, 2 Mod. 207.

(7) per Lord Hale, 1 Ventr. 379.

life; whereas in *Southcot* v. *Stowell*, he had limited a present use to his son in tail.

(*p*) For the father dying before the marriage of his son, in the one case, or before the expiration of the forty years, in the other case, the estate would descend. *Pybus* v. *Mitford*, 1 Mod. 160.

SECTION V.

And the words of the statute 29 Car. II. cap. 3, "and to no other uses," shall be construed to no other express uses; but shall not prevent uses by implication, which arise of necessity; because the uses must be in somebody. But an use reserved by implication of law, shall not be implied against the express intent of the conveyance; for the statute of frauds, which saves resulting trusts, extends only to such as were resulting trusts before the statute, and a bare declaration by parol before the act, would prevent any resulting trust(1); so if an express estate be limited to the covenantor(q). A fortiori, where the estates take

(1) *Bellasis* v. *Compton*, 2 Vern. 294. Gilb. Uses, 59.

(q) The grantor, in this case, having expressly limited an estate for years to himself, had he taken the freehold by implication, this use for years would have been merged in it, which would be raising an estate by implication, to destroy an estate expressly limited in the deed, directly contrary to the nature of implications. Fearne's Cont. Rem. 41. But if an estate for years had been limited away, and no use limited to the

effect by transmutation of possession, and a particular estate is limited to the grantor, as for ninety-nine years (2), remainder to trustees for twenty-five years, remainder to himself in tail male, &c. this is void, for want of a freehold to support it.

(2) *Adams* v. *Savage*, 2 Salk. 679. See also Dyer, marg. 211. *Rawley* v. *Holland*, 22 Vin. Ab. 189. c. 11. 2 Eq. Ca. Ab. 753. Fearne's Essay Cont. Rem. 16. et seq.

grantor, he would have been by implication entitled to the use of the present freehold, which was not limited away, which would have supported the limitation over to the heirs of his body. *Penhay* v. *Hurrell*, 2 Vern. 370. 2 Freem. 231, 235, 258.

CHAP. VI.

Of the Extinguishment of Uses.

SECTION I.

We will now see where the use may be extinguished or not. For to every execution of an use by force of this statute, four things are requisite (1): 1st, A person seised (*a*); 2dly, A person cestui que use (*b*);

(1) *Chudleigh's* case, 1 Rep. 126.

(*a*) Though I have already had occasion to touch upon this point, it may be material to consider more particularly who may be and shall be considered to be seised to an use; in the course of which, I shall point out what persons, though incapable of being seised to an use, may hold as trustees. To stand seised to an use, two things are necessary; first, That the person be capable of confidence and trust; secondly, That he take the estate under the trust limited and appointed.

1st, All persons (in which are included even femes coverts and infants) may *primâ facie* be considered as capable of confidence; it will therefore be sufficient to enumerate the exceptions to this general capacity.

1. Bodies politic are not capable, because they are framed at the will of the king, and are no further capable

3dly, An use in esse (*c*) viz. in possession, reversion or remainder; 4thly, The estate

than he wills them: and it is his will that they should purchase for the common benefit, and for the ends of their creation, and that they should not take any thing in trust for others; also, being incorporate, the Chancery had no process on the persons to compel them to discharge their trust; Gilb. 5. 1 Rep. 122. Poph. 72. But chiefly, says Lord Bacon, because of the letter of the statute, which, in any clause when it speaketh of the feoffee, resteth only upon the word person; but when it speaketh of cestui que use, it addeth person or body politic; Readings on Statute of Uses, 347. And as bodies corporate are incapable of standing seised to an use, so are they incapable of taking as trustees; *Sonley* v. *Masters*, &c. of the Clock Maker's company, 1 Bro. Ch. Rep. 81; except as trustees for charities, which they are allowed to do by the equity of 43 Eliz. c. 4. § 1. *Griffith Flood*'s case, Hob. 136. 2 Vern. 454. Sanders' Uses, 153.

2. Aliens and persons attainted are not capable of standing seised to an use, for they can take for no person's benefit but the king's. 1 Rep. 122. Poph. 72. 1 Roll's Rep. 382.

3. The king cannot be seised to an use, because there is no means to compel him to perform his trust; Poph. 72. Hard. 468. 1 Roll's Rep. 332. Bro. Feoffm. al. Uses, 381. Gilb. Uses, 5. But in the case of *Killdare* v. *Eustace*, 1 Vern. 439, the master of the rolls intimated an opinion that the king might be a trustee. But quære?

out of which the use arises ought to vest in cestui que use (*d*). And all these four must

2dly, But though the person be capable of confidence and trust, yet it is further requisite, in order to affect him with the use, that he take the estate upon the trust limited, which may be done by express words or by implication.

1. By express words, as where by the words of the deed the uses are distinctly and expressly declared.

2. By implication, as where one takes a feoffment without consideration, or having notice of the several uses and trusts, there he shall be supposed to take it subject to those uses and trusts, for the law will suppose a man's actions rather just than otherwise. But where a man takes from the feoffees, for valuable consideration, a greater estate than they had, he shall not be affected by the use though he had notice of it, but shall take it to his own use; Gilb. Uses, 6, 7; neither shall a man be affected with a use to another if his claim be founded on a title paramount, as the title of a lord by escheat, or the lord of a villein, or a lord who enters for mortmain, or who recovers by a cessavit; Gilb. Uses, 10. 1 Rep. 122; nor shall persons be affected with an use to another, who claim adversely to the estate out of which the use was to be served, as disseisors, abators, intruders; Gilb. Uses, 10. 1 Rep. 122; nor shall persons whose estates are cast upon them by act of law stand seised to the use of another, as tenants by the courtesy, tenants by dower, and tenants in tail; Gilb. Uses, 10, 11, 171; Sanders' Uses, 86. 1 Rep. 122. But a tenant in tail may be a trustee; *Clowdsly* v. *Pelham*, 1 Vern. 411. whether he may not stand seised to an

concur at one and the same point of time. So that every use in esse, viz. in possession,

use, see Sanders on Uses, 145; Mr. Hargrave's note (3), Co. Litt. 19, b.; Lord Bacon's Readings on Statute of Uses, Law Tracts, 347. In short, there must to every seisin to an use be a confidence in the person, and privity of estate, and if either of these requisites be wanting, or fail, the use cannot be executed. But though the use cannot be executed for want of a person capable of standing seised, yet as a trust shall never be allowed to fail on account of any disability in the trustee, courts of equity being guided more by the intent in raising and fastening the trust on the estate than by the ability or disability of the trustee; therefore though no trustee be named, or he die in the life-time of the testator, or he be an improper or incapable person, yet the trust shall prevail, and the author of the trust or his heir shall be decreed to execute it; *Gravenor* v. *Hallum*, Ambl. 642; *Sonley* v. *Master, &c. of the Clockmakers' Company*, 1 Bro. Ch. Rep. 81. *Quære*, whether such defective use would not before the statute have been supported in equity? See 1 Rep. 137.

(*b*) As there should be a person capable of being seised to an use, so must the person in whose favour it is to arise be capable of receiving or taking it. Persons therefore who are incapable of taking the lands themselves, are incapable of taking an estate in the lands by way of use. But if they are capable of taking though not of holding the lands, as in the case of an alien, Co. Litt. 2. b. Mr. Har. note (1); Godb. 275; Dyer, 283, b. (but see Gilb. Uses, 43, 204) they are capable of an use in the lands: the king, though he cannot have feoffees to his use, may take an use by

reversion, or remainder, where the other circumstances are not wanting, is executed by the statute immediately(*e*); but no future

conveyance of record; Lord Bacon's Readings, 349, Gilb. Uses, 44. Sanders' Uses, 90; but a monk cannot have an use; Gilb. Uses, 90; nor will an use arise to a parish; but though a limitation of an use to a parish is void as an use, yet it is good as a trust; Gilb. Uses, 44. Sanders' Uses, 90, 91.

(*c*) The words of the act being "every person that has, or hereafter shall have any use," to the raising of which, as already observed, there must be a subject on which an use may be limited, *viz.* of which the use can be separated from the possession, and whereof seisin can be instantly given, and also a sufficient consideration or an express declaration of the use.

(*d*) The act declaring, "That the estate of such person seised to an use shall be adjudged in cestui que use."

(*e*) As the statute mentions uses, trusts, and confidence, it executes the possession to the use, if expressed by either of these words; *Eure* v. *Howard*, Pre. Ch. 345, Skin. 209; *Broughton* v. *Langley*, 2 Salk. 679; see Sanders on Uses, 154. As to what other words will raise an use, see Sanders, 155, 161.

But it seems material to remark, that as it is a rule that where conveyances may operate both by common law and statute, they shall receive their operation from the common law, if a feoffment be to A. and his heirs, to the use of A. and his heirs, such use will not be a statute use, but a common law use, the use and the

or contingent use, till they come in esse. 2dly, All uses, whether contingent or others, not executed by the statute, remain in the mean time at common law; so that if the root is defeated, out of which they ought to spring, the uses are utterly destroyed (2); that is, if the feoffees and their heirs do not continue their seisin, or some other by their assignment, against whom there may be a remedy in equity; as where the party is in, in the per, and with notice (3), or without a consideration, for then the law implies notice (*f*); But a lease for years shall only

(2) *Chudleigh's* case, 1 Rep. 121, 122, 126. *Haynes* v. *Villers*, 2 Siderf, 64, 158.

(3) *Wegg* v. *Villers*, 2 Roll's Ab. 796, 797.

estate going together. See *Jenkins* v. *Young*, Cro. Car. 230; Lord *Altham* v. Earl of *Anglesey*, Gilb. Rep. 16.

(*f*) "Originally it was held that Chancery could give no relief but against the very person himself intrusted, for cestui que use, and not against his heir or alienee. This was altered in the reign of H. VI. with respect to the heir; and afterwards the same rule, by a parity of reason, was extended to such alienees as had purchased either without a valuable consideration, or with an express notice of the use;" 2 Bla. Com. 329; and the reason assigned by Lord Bacon is, "because the Chancery looketh farther than the common law, viz. to the corrupt conscience of him that will deal in the land, knowing it in equity to be another's; and therefore if there were radix amaritudinis, the consideration purgeth it not, but that it is at the peril of him that giveth it;

bind the future use, and not destroy it for the freehold, because the seisin remains (4). 3dly, It was formerly held, that the feoffees after the statute had a possibility to serve a future use, when it came in esse, and that they should be reputed the donors of all the contingent estates when they vested; and if the possession was disturbed, the feoffees should have power to re-enter to revive the future uses according to their trust; but if they bar themselves of their entry, then this case being not remedied by the statute, remains at common law (5). But this opinion has been since contradicted (g); and it is now held, that, to the raising of the

(4) *Bolls* v. *Sir H. Winton*, Noy. 122. 2 Roll's Ab. 794. Gilb. Uses. 139.

(5) *Chudleigh's* case, 1 Rep. 137. Shepherds Touchs. 523.

so that consideration or no consideration is an issue at the common law, but notice or no notice is an issue in the Chancery. Readings on Stat. of Uses, 312.

(g) See *Hales* v. *Risley*, Pollex. 390; in which the doctrine laid down in *Chudleigh's* case, and *Wegg* v. *Villers*, and several other cases, is referred to the dread of a perpetuity; and as such reason is done away by the determination of *Archer's* case, the power of the feoffees to destroy the contingent remainders, or the necessity of their entries to reduce or restore them, are said no longer to exist. With respect to the necessity of the feoffee's actually entering to restore the contingent uses, Mr. Fearne observes, that we ought to be very cautious how we at this day admit such a doctrine in practice, a doctrine which would lead us to con-

future uses after the statute, the regress of the feoffees is not requisite, and that they have no power to bar these future uses; for the statute has taken and transferred all the estate out of them, and they are as mere instruments. So that contingent uses do now, like other contingent remainders, depend upon the particular estate. For to reduce the estates conveyed by way of use to the common law, which all sides agree was the chief end of the statute of uses, nothing ought to be left in the feoffees, no need of any scintilla juris, or power of re-entry for the benefit of the contingent uses, nor power in the feoffees to destroy them, but but they are mere conduit-pipes. And the

clude, that in the common cases of strict settlement upon marriage, where the conveyance is by way of use, if the father, the first tenant for life, were by feoffment to devest the estates, leaving them a right of entry, the contingent remainders to the sons could not take effect, unless the mother, supposing her to take a remainder for life, and to survive the father, or else the trustees, to whom the remainder for preserving contingent uses was limited, or else the general grantees or releasees, to whom the lands were conveyed to the uses expressed, should actually make an entry into the lands; an opinion, which, he observes, with all due deference to what was delivered by the court of King's Bench, in their arguments upon the case of *Wegg* v. *Villers*, he cannot persuade himself would hold at this day.

other conceit was grounded, as it seems, upon a zeal against perpetuities and contingent remainders (6), there being at that time no received opinion that the destruction of a particular estate would destroy a contingent remainder, till afterwards, in *Archer*'s case (7), it was so adjudged.

(6) *Hales* v. *Risley*, Poll. 385, 392.

(7) 1 Rep. 66.

SECTION II.

And it seems to be the rule of this court, that where a man is a purchaser for valuable consideration, without notice, he shall not be annoyed in equity (*h*); not only

(*h*) This rule is founded on a principle of equity too obvious to require illustration. It seems, however, to have been broken in upon by the decisions in the cases of *Burgh* v. *Burgh*, Rep. Temp. Finch, 28; and *Williams* v. *Lambe*, 3 Bro. Ch. 264: in the former of which cases the court appears to have interposed to the prejudice of a judgment-creditor, without notice of plaintiff's equity; and in the latter, to the prejudice of a purchaser, without notice of plaintiff's title as dowress. With respect to those instances in which a bonâ fide purchaser has in equity been postponed, in respect of his conniving at the subsequent fraud of him under

where he has a prior legal estate, but where he has a better title or right to call for the legal estate than the other (1). But by taking a conveyance, with notice of the trust, he himself becomes the trustee (*i*), and must not, to get a plank to save himself, be

(1) *Wilker* v. *Bodington*, 2 Vern. 599. *Collett* v. *De Gols and Ward*, Forrest. 69. *Mansell* v. *Mansell*, 2 P. Wms. 678. *Brandlym* v. *Ord*, 1 Atk. 571. *Snelling* v. *Squint*, 2 Ch. Ca. 47. *Millard*'s case, 2 Freem. 43. *Digby* v. *Morgan*, 1 Ch. Rep. 129.

whom he derived his title, they are evidently exceptions to the general rule, which is confined to the claim of the purchaser at the time of completing his purchase; a claim which he may forfeit as to third persons, by subsequent misconduct. See B. 1. c. 3. s. 4. It may also be proper to observe, that though a purchaser for valuable consideration, without notice of a fraud by him under whom he claims, shall not be prejudiced in equity, he shall not be assisted against the party upon whom the fraud was committed.

(*i*) This proposition is stated too generally; for though an immediate or first purchaser, with notice of an equitable claim in another, shall certainly not be allowed, though a purchaser for valuable consideration, to protect himself against such equitable claim; yet if a person, having notice of an equitable claim in another, purchase from one who had not notice of such claim, he may protect himself by want of notice in his vendor, such protection being necessary to secure to the bonâ fide purchaser, without notice, the full benefit of his purchase; *Harrison* v. *Forth*, Pre. Ch. 51; *Brandling* v. *Ord*, 1 Atk. 571; *Sweete* v. *Southcote*, 2 Bro. Rep. 66. Neither shall a purchaser, without notice from a purchaser with notice, be considered in equity as bound

guilty of a breach of trust, notwithstanding any consideration paid (2). Yet where the trust is general, as to pay debts, though he has notice of them, the purchaser seems not obliged to see the money applied (3); otherwise, if the debts be particular (*k*), as for payment of debts in a schedule (4). So although the law hath entrusted the executor

(2) *Saunders* v. *Dehew*, 2 Vern. 271.

(3) *Culpepper* v. *Aston*, 2 Ch. Ca. 115, 221. *Elliott* v. *Merryman*, Barnard. 78. *Lloyd* v. *Baldwin*, 1 Ves. 173. *Ithell* v. *Beane*, 1 Ves. 215. *Smith* v. *Guyon*, 1 Bro. Ch. Rep. 186.

(4) *Cottryll* v. *Hampson*, 2 Vern. 5. *Lloyd* v. *Baldwen*, 1 Ves. 173.

by the trust; *Ferrars* v. *Cherry*, 2 Vern. 384; *Mertins* v. *Jolliffe*, Ambl. 313. It may be material to remark, that notice is not confined to the time of the contract; for if a person who has a lien in equity on the premises, give notice of such equitable lien before actual payment of the purchase money, it is sufficient; *Tourville* v. *Nash*, 3 P. Wms. 307; *Story* v. *Lord Windsor*, 2 Atk. 630; *Hardingham* v. *Nicholls*, 3 Atk. 304. Or before the execution of the conveyance, though the purchase-money be actually paid. See *Wigg* v. *Wigg*, 1 Atk. 384; but see *Hill* v. *Bickerdike*, 12 May, 1801, Exch.

(*k*) But though the purchaser be bound to see to the application of the money, as to scheduled debts, he is not bound to see that only so much real estate is sold or mortgaged as will discharge such scheduled debts; *Spalding* v. *Shalmer*, 1 Vern. 301; unless there be collusion between the heir and trustee; *Culpepper* v. *Aston*, 2 Ch. Ca. 115, 221. Neither is he bound to see to the payment of debts generally, nor of legacies, if the estate be charged generally with debts and legacies; for not being, in such case, bound to see to the discharge of

with the personal estate to pay debts, and unless he has an absolute power, he has none at all; yet if a term is devised to executors to raise 2,000*l.* for the portion of his daughter, and the executors mortgage this term, the portion shall be preferred(*l*).

debts, he cannot be expected to see to the discharge of legacies, which cannot be paid till after the debts; *Marvin* v. *Cook*, 5th May, 1708; *Jebb* v. *Abbot*, 9th February, 1782; Bro. Appendix to 1 vol. Rep. Ch. p. 11, *Rogers* v. *Skillicorne*, Ambl. 188.

(*l*) This point was so adjudged by the House of Lords, in the case of *Humble* v. *Bill*, 2 Vern. 444. But it seems to have been overruled by the case of *Ewer* v. *Corbett*, 2 P. Wms. 148; *Elliott* v. *Merryman*, 2 Atk. 41. Barnard. 78, and particularly in *Nugent* v. *Gifford*, 1 Atk. 463. recognised in *Ithell* v. *Beene*, 1 Ves. 215; *Meade* v. *Lord Orrery*, 3 Atk. 235. In which cases it was held, that the alienation of the executor, even for his own debt, would be good, unless the purchaser colluded with the executor, as in *Crane* v. *Drake*, 2 Vern. 616. But see *Tomlinson* v. *Smith*, Rep. Temp. Finch, 378; *Langley* v. *E. of Oxford*, Ambl. 17, and Mr. Butler's note, Co. Lit. 292. See also *Andrew* v. *Wrigley*, 4 Bro. Rep. 125, *Bonney* v. *Ridgard*, cited in 2 Bro. Rep. 438; *Hill* v. *Simpson*, 7 Ves. 152. But see *Macleod* v. *Drummond*, 14 Ves. 353, and 17 Ves. 152.

SECTION III.

It is notice of the use, therefore, that is all the effect of the matter; for then he is particeps criminis, et dolus et fraus nemini patrocinantur (1), since in conscience he purchased my land or my goods. For the common law, whenever it found a consideration discharged the covin; but Chancery looks further to the corrupt conscience of the party, that will traffic for what in equity he knows to belong to another (2). And in all cases where the purchaser cannot make out a title, but by a deed which leads him to another fact, the purchaser shall not be a purchaser without notice of that fact, but shall be presumed cognizant thereof(*m*); for

(1) *Fermor's* case, 3 Rep. 78, b. Palmer, 158.

(2) Ld. Bacon's Readings, p. 12.

(*m*) The general rule is, that whatever is sufficient to put the party upon an inquiry, is good notice in equity. *Smith* v. *Low*, 1 Atk. 490. *Mertins* v. *Jolliffe*, Ambl. 313. See also *Plumb* v. *S. Fluitt*, MS. Feb. 3, 1791. *Taylor* v. *Stibbert*, 2 Ves. jun. 437. *Daniels* v. *Davison*, 16 Ves. 250. *Newman* v. *Kent*, 1 Merivale, 240. But a purchaser is not bound to take notice of an equity arising out of the mere construction of words which are uncertain. *Cordwell* v. *Mackrill*, 2 Eden's R. 347.

it was crassa negligentia, that he sought not after it, and this is in law a notice (3). So where in a jointure there was a covenant against incumbrances, except leases, or copies determinable on three lives, the exception of leases ut supra, gave notice of former leases, and therefore he must take notice of the covenants contained in them (4). So there was sufficient notice in law, or an implied notice, where the mortgage was excepted in the defendant's conveyance, and therefore they could not be ignorant of the mortgage, and ought to have seen it, and that would have led them to the other deeds, in which, pursued from one to the other, the whole case must have been discovered to them (5). And notice of the marriage has been construed as notice of the jointure; because the wife, being under the power of her husband, could not give proper notice, so as to prevent the alienation of her interest. So if a man purchases under a will, by which the trust is created, he must at his peril take notice of the operation and construction of the law upon it. And though this be called a notional notice, yet it is such a notice as has always been allowed to be good; for every man is

(3) *Moor* v. *Bennet*, 2 Ch. Ca. 246. *Bovey* v. *Smith*, 1 Vern. 149. *Ferrars* v. *Cherry*, 2 Vern. 384. *Dunch* v. *Kent*, 1 Vern. 319. *Draper's Company* v. *Yardley*, 2 Vern. 662.

(4) *Tanner* v. *Florence*, 1 Ch. Ca. 259. *Vane* v. *Ld. Barnard*, Gilb. Rep. 7.

(5) *Bisco* v. *E. of Banbury*, 1 Ch. Ca. 287.

presumed to be conusant of the law of the realm (*n*), and he shall not take advantage of his own ignorance, but caveat emptor (6).

(6) Arg. *Bovey* v. *Smith*, 2 Vern. 149.

(*n*) So also is every man presumed to be attentive to what passes in a sovereign court of justice; and, therefore, a purchaser pendente lite, even for valuable consideration, and without express or otherwise implied notice, will be bound by the decree. *Sorrel* v. *Carpenter*, 2 P. Wms. 482. *Worsley* v. *E. of Scarborough*, 3 Atk. 392. *Moor* v. *Moor*, Barn. 407. *Walker* v. *Smallwood*, Ambl. 676. But lis pendens being only a general notice of an equity to all the world, it cannot affect any particular person with a fraud, unless such person had also express notice of the title in dispute. *Meed* v. *Lord Orrery*, 3 Atk. 243. The lis pendens must also, in order to bind, be in full prosecution. *Preston* v. *Tubbin*, 1 Vern. 286. In general, a decree is not constructive notice to persons not parties to it; but if a person not party have express notice of such decree, he shall be bound by it. *Harvey* v. *Montague*, 1 Vern. 57. As to notice of a judgment, though not docketted, or of a deed, though not registered, see *Davis* v. *E. of Strathmore*, 16 Ves. 419, 1 Str. 664, or as to a deed registered, see *Cator* v. *Cooley*, 1 Cox's Rep. 182.

SECTION IV.

AND notice of the plaintiff's title to the agent or purchaser for another (1), as likewise notice to the counsel or attorney that peruses the title (2), is notice to the party himself, because a presumptive notice to the party. So where all the securities were transacted by the same scrivener (3), notice to him is notice to them all; and consequently they that lend last must come last, for he was in nature of an agent to them all. So where *A.*, having notice of an incumbrance, purchases in the name of *B.*, and then agrees that *B.* shall be the purchaser, and he does accordingly pay the purchase money, without notice of the incumbrance; though *B.* did not employ *A.*, nor knew any thing of the purchase till after it was made, yet *B.* approving of it afterwards, made *A.* his agent ab initio, and therefore shall be affected with the notice of *A.* (4). But though notice to a man's counsel is construed as notice to himself, yet where the counsel comes to have notice of the title in another

(1) *Merry* v. *Abney*, 1 Ch. Ca. 38. *Sheldon* v. *Drummond*, Ambl. 624. *Coote* v. *Mammon*, 2 Bro. P. C. 596. *Hiern* v. *Mill*, 13 Ves. 120. 3 Atk. 646.

(2) *Le Neve* v. *Le Neve*, 3 Atk. 646.

(3) *Brotherton* v. *Hatt*, 2 Vern 574.

(4) *Jennings* v. *Moore*, 2 Vern. 609. 1 Bro. P. C. 244. *Vane* v. *Ld. Barnard*, Gilb. Rep. 7.

affair which it may be he has forgot, when his client comes to advise with him in a case, with other circumstances, that shall not be such a notice as to bind the party (5) (*o*).

(5) *Preston* v. *Tubbin*, 1 Vern. 286, 287. *Lowther* v. *Carlton*, 2 Atk. 139.

(*o*) The rule laid down in *Fitzgerald* v. *Falconbridge*, Fitzgibbon, 207, requires the notice to be in the same transaction, which rule is distinctly recognized by Lord Hardwick in *Warwick* v. *Warwick*, 3 Atk. 291. See *Hall* v. *Smith*, 14 Ves. 426.

SECTION V.

LASTLY, a trust is revived by a re-purchase of the trustee, although a fine passed; for it being but a conveyance, it did not extinguish or separate the trust, but transferred both together, and in the gift of the land he gives all the interests and demands by reason of the land. And so, where a man wrongfully possesses himself of my goods, and sells them in a market overt; if he afterwards buys these goods again, I may seize them in his custody (1) (*p*).

(1) *Bovey* v. *Smith*, 2 Ch. Ca. 126. 1 Vern. 60.

(*p*) The decree referred to in *Bovey* v. *Smith* appears to have been reversed by the Lord Keeper, 1 Vern. 144; but the reversal is referrible to the implied acqui-

escence of the cestui que trust. The rule stated by our author may therefore be considered as in no degree affected by such reversal; and indeed it seems to flow from the maxim of law, that no man shall be allowed to take advantage of his own wrong: upon the ground of which maxim it has been held, that if a desseisor alien, and a descent is cast, and afterwards the disseisor re-acquires the estate, the disseisee may re-enter. Litt. s. 39. Co. Litt. 242, a.

SECTION VI.

As to the revocation of uses (*q*), it is a general rule, that things may be avoided and determined by the same ceremonies

(*q*) Powers of revocation of uses of lands are very frequent in merely voluntary conveyances, but have of late been disused in marriage settlements, doubts having arisen whether such settlements are not fraudulent within the 27th Eliz. *Buller* v. *Waterhouse*, Sir T. Jones, 94, 95. See Mr. *Booth*'s opinion annexed by Mr. Hillyard to 6th ed. Sheppard's Touchstone. Powers of revocation, in their creation, are to be construed favourably, and therefore no express or technical words are necessary to the creating of such powers; but any expression which denotes an intent to reserve such power will be sufficient. See Bishop of *Oxford* v.

and acts by which they were raised. That which passes by livery ought to be avoided by entry; that which passes by grant, by claim; that which passes by way of charge, determines in like manner by way of discharge. And so at common law, an use which was raised by a declaration or limitation might cease by words of declaration or limitation (1). But an use executed by the statute differs not from a legal estate, and

(1) Ld. Bacon's Readings on Statute of Uses, 314.

Leighton, 2 Vern. 376. *Lavender* v. *Blackstone*, 3 Keb. 26. But if such power be once executed, that is, the old uses over the whole estate revoked, and new uses limited, such new uses cannot be revoked without an express reservation of a power for such purpose; *Hele* v. *Bond*, Pre. Ch. 474. See also *Zouch* v. *Woolston*, 2 Burr. 1136. 2 Ves. 211. A power of revocation may extend to all the limitations, or be restricted to a particular estate limited by the conveyance; as where the use is to *A.* for life, remainder over, with a power to revoke the estate for life only, this seems, says Rolle, to be a good power; *Thomson* v. *Freston*, 2 Roll's Abr. 262, pl. 1. A power of revocation may be either a power relating to the land, that is, a power limited to one that had, hath, or shall have an estate or interest in the land; which power is either appendant or in gross, or simply collateral; as where the party to whom the power is reserved hath not, nor ever had any estate in the land; *Edwards* v. *Slater*, Hard. 415. Gilb. on Uses, 141, 143. Sanders on Uses

cannot be waived or determined without entry. Yet for the necessity, where the party himself is tenant for life, (as in the usual powers of revocation), by the revocation the estate ceases without entry or claim; because he cannot enter upon himself, and an express act of revocation is as strong as any claim can be (2). And therefore, that which in a conveyance at common law is called a condition, by way of use is called a limitation, or a conditional limitation; because it has the effect of a limitation to determine an estate of freehold without entry (3). And by the same conveyance as the ancient uses are revoked, by the same conveyance other uses may be limited or raised: for since the ancient uses cease ipso facto by the revocation, without claim or other act, the law will adjudge a priority of operation in the deed, though it be sealed and delivered, and takes effect altogether. And therefore it shall be first in construction of law, a revocation and ceasing of the ancient uses, and then a limitation or raising of new; for the law will marshal several acts

(2) *Digges'* case, 1 Rep. 174. a.

(3) Co. Litt. 237. a. 203. b. Butler's note (1) Moore, 612. 4 Burr. 1931.

and Trusts, 288, & *seq.* As to the difference of construction of such powers as are coupled with an interest, and such as are purely callateral, see next section.

done at the same time that all may stand (4). But unless he reserves a power expressly to limit new uses, he can only revoke (*r*).

(4) *Digge's* case 1 Rep. 174. *Fitzwilliam's* case, 6 Rep. 32, 33.

(*r*) By which must be understood, that the old conveyance cannot be charged with new uses, unless a power to limit new uses be reserved. This proposition is agreeable to the decision of the court of Common Pleas; see *Anon.* 1 Str. 584; but it is in direct opposition to the authority of Sir Wm. Blackstone, 2 Com. 339, who states the limitations of new uses to be incident to the power of revoking the old uses. The learned commentator refers to Co. Litt. 237. The passage on which he relies, is, that if the covenantor who had an estate for life revoke the uses according to his power, he is seised again in fee-simple, without entry or claim. The consequence of revocation, as thus stated by Lord Coke, is certainly good law; and as the uses of the original conveyance are destroyed, he may of course limit new uses by a new grant or covenant on consideration; but the doubt is, whether such new uses can take effect, as uses springing out of the original conveyance. Mr. Powell, who has brought together the cases upon this point, conceives that they cannot; for that the old uses, ceasing by the revocation, and there being no express power to declare new uses, the estate out of which the old uses arose becomes free from them; for that estate was only bound by the uses limited thereon, with power of revocation, and the consideration extended to those uses only; and consequently after revocation it was freed from them. Powell on Powers, 279. And the case of *Ward* v. *Lenthal*, 1 Siderf. 343, seems to bear out this opinion; for in that case, the deed limiting new uses having reserved a power of revocation, but not a power to limit new uses, the subsequent declara-

tion of new uses was held bad. But the cases referred to in *Colston* v. *Gardner*, 2 Ch. Ca. 36, and in *Fowler* v. *North*, 3 Keble, 7, are certainly irreconcileable with Mr. Powell's conclusion, and our author's proposition, even qualified as above. But see *D. of Marlborough* v. *Ld. Godolphin*, 2 Ves. 77. *Lord Teynham* v. *Webb*, 2 Ves. 198. *Hill* v. *Bond*, Pre. Ch. 474. *M'Queen* v. *Farquhar*, 11 Ves. 475.

SECTION VII.

THESE powers of revocation were only allowable in conveyances by way of use (*s*), for in a legal conveyance such a power would have been repugnant (1). And they are a law which a man puts upon himself, by virtue of the power which every one has of disposing of his own as he pleases; and therefore they ought to be performed in all the incidental circumstances required by

(1) Co. Litt. 237.

(*s*) By this must be understood a statute use, for if *A.* enfeoff *B.* and his heirs, to the use of *B.* and his heirs, the use will be executed at common law, and the proviso or power of revocation by the feoffor would be repugnant and void, Touchstone 525.

the proviso (2), viz. as to subscription, witnesses, or the like; for these ceremonies were appointed by him to prevent fraud and surprise (*t*). And there can be no revocation in equity (3), where it is not a good revocation at law (*u*), unless there be

(2) *Scrope's* case, 10 Rep. 144. *Kibbett* v. *Lea*, Hob. 312. *Bath* and *Montague's* case, 3 Ch. Ca. 55. 65, 108. *Duchess of Albemarle* v. *Bath*, 2 Freem. 121.

(3) *Bath* v. *Montague*, 3 Ch. Ca. 108. *Pigott* v. *Penrice*, Comyns's Rep. 250. Pre. Ch. 471. *Zouch* v. *Woolston*, 2 Burr. 1136. *Cox* v. *Chamberlain*, 4 Ves. 631, 638.

(*t*) That uses may in favour of the intent, be revoked by construction or implication, see *Scrope's* case, 10 Rep. 144. *E. of Leicester's* case, 1 Ventr. 280. *Ellison* v. *Ellison*, 6 Ves. 656.

(*u*) With respect to what shall be deemed a good execution of such power, it seems agreed, that it may be executed by several deeds, if the first executed do not extinguish the power; see *E. of Leicester's* case, 1 Ventr. 280. It seems also agreed, that the power of revoking the old and limiting new uses may be executed at different times over different parcels of the estate subjected thereto; see *Zouch* v. *Woolston*, 2 Burr. 1136, in which the cases upon this point are brought together; see also Powell on Powers, 262. A power of revocation may also be executed conditionally or pro tanto. *Thorne* v. *Thorne*, 1 Vern. 141. *Perkins* v. *Walker*, 1 Vern. 97. It may also be executed absolutely, or with power of revocation. *Adams* v. *Adams*, Cowp. 651. It also seems agreed, that a power to lease the premises is incidental to the power to revoke the uses; *Goodright* v. *Cater*, Dougl. 467, 468. I cannot conclude this note without recommending the reader to consult Mr. Powell's Essay on the Law of Powers, which brings together the various nice and abstruse learning which belongs to this subject.

a clear intention of the party to revoke, which he was prevented carrying into execution pursuant to the power, by fraud or accident (4). But there is a difference betwixt a power reserved to a stranger, and to the owner himself. For a power to alter or charge the estate of another shall be construed strictly, and shall never be extended beyond the letter and intention of the parties, because it is to affect the estate of a third person (5). But a power over a man's own estate is parcel of the old dominion reserved to him, and for the benefit of the party himself, and voluntary, and therefore shall be expounded favourably, many estates depending upon such powers (6). Also a power reserved to himself, who has a present estate, or shall have by the ceasing of the uses, savours of an interest, and may be extinguished by a feoffment of the land, or release to him that has the freehold; for he who raises and limits the use, shall be supposed the donor (7); but a power to a stranger (8) is merely collateral (*x*).

(1) *Bath* v. *Montague*, 3 Ch. Ca. 108.

(5) *Sayle* v. *Freeland*, 2 Ventr. 350. *E of Leicester's* case, 1 Ventr. 279.

(6) *Sayle* v. *Freeland*, 2 Ventr. 350. *Fitzgerald* v. *L. Falconbridge*, Fitzgib. 7.

(7) *Digges'* case, 1 Rep. 174. a.

(8) *Digges'* case, 1 Rep. 174. *Willis* v. *Shorral*, 1 Atk. 474.

(*x*) If the power be simply collateral, the fine or feoffment of him who created it will not extinguish it. Gilb. Uses, 144. *Willis* v. *Shorral*, 1 Atk. 474. Nei-

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ther will a release by him to the owner of the freehold. *Digge's* case, 1 Rep. 174. Nor can he, in executing it, reserve to himself a power of revocation. *Wall* v. *Thurborne*, 1 Vern. 355.

SECTION VIII.

In case of merger of terms, the diversity formerly taken (1) was this, if a man has the same interest, and absolute dominion and property in the whole inheritance (*y*) as he has in the term, or power for raising

(1) Gilb. Lex. Prætoria, 264.

(*y*) The general rule is, that where there is no legal estate standing out, but only an equitable charge, and the inheritance comes to the person entitled to the charge, the charge shall merge; *Donisthorpe* v. *Porter*, Ambl. 600; but the estate of inheritance must be an estate in fee-simple, and not merely an estate tail. *Duke of Chandos* v. *Talbot*, 2 P. Wms. 604. *Chester* v. *Willes*, Ambl. 246. With respect to mergers of charges by the particular tenant paying them off, it seems that a tenant for life, discharging an incumbrance, shall not be presumed to have intended to benefit the inheritance; but that a tenant in tail, discharging an incumbrance, shall be presumed so to intend; but the presumption in either case may be repelled. See *Jones* v. *Morgan*, 1 Bro. Ch. Rep. 206.

money out of the inheritance, there it must merge; for a man cannot have a power to raise money merely for my benefit out of that which is mine. But if there be any difference in the two interests (*z*), or any other person intermediate (2), then there can be no merger; for if there be any merger in the first case, it will change the intent of the conveyance; and in the other case, there being an intermediate estate, there is no merger at law, no more is there in a court of equity in the case of a trust (3). But it has been since held (4), that where the inheritance descended to the daughter, as heir, who was also entitled to the trust of the term for her portion, so that she had the same dominion over both, yet there could be no merger of the term, for that was lodged in trustees, and so not merged at law, nor consequently in equity. For where an infant has two rights in her, this

(2) *Chamberlain* v. *Ewer*, 2 Bulst. 11. 1 Brownl. 134. *Deighton* v. *Grenvil*, Comberbach, 81. *E. of Bedford* v. *Russel*, Poph. 3. *Plunkett* v. *Holmes*, 1 Lev. 11.

(3) *Hopkins* v. *Hopkins*, 1 Atk. 592.

(4) *Thomas* v. *Keymish* 2 Vern. 348. *Brown* v. *Gibbs*, 2 Freem. 233. *Powell* v. *Morgan*, 2 Vern. 90.

(*z*) As if one interest be in auter droit, and the other not. Co. Litt. 338. b. 4 Leon. 37. *Cage* v. *Acton*, 1 Salk. 326. *Platt* v. *Heap*, Cro. Jac. 275. See 15 Viner's Abridgment, Merger, A. 2. p. 362. So if the husband be possessed of the term in right of his wife, his purchase of the fee will not extinguish the lease. *Gong* v. *Radford*, Hob. 3. See *Forbes* v. *Moffatt*, 18 Ves. 384.

court, which is to take care of infants, will always preserve that right which is most beneficial for the infant. And in this case it was for the interest and advantage of the infant, that the portion should be looked upon as a continuing and subsisting charge, and not sink into the inheritance; because it might have been a means to have preferred her in marriage during her infancy, before she was capable of making a settlement of her real estate; and likewise when of the age of seventeen (5) she was capable of disposing by will of her personal estate, either for payment of debts, or in legacies amongst her relations (*a*).

(5) *Bishop* v. *Sharpe*, 2 Vern. 469. *Hyde* v. *Hyde*, Pre. Ch. 316.

(*a*) In the case of *Thomas* v. *Keymish*, referred to, as also in the case of the *D. of Chandos* v. *Talbot*, 2 P. Wms. 604. *Powell* v. *Morgan*, 2 Vern. 90, the daughter had by will disposed of the money with which the estate was charged, which, furnishing distinct evidence of her intention to keep the term separate from the inheritance, brings it within the distinction stated by Lord Hardwicke; that when the owner of the fee in which the charge would otherwise merge, manifests his intent that the charge should subsist, his intent, if clear, shall prevail. *Chester* v. *Willes*, Ambl. 246; see also *Lord Compton* v. *Oxendon*, 4 Bro. Ch. Rep. 397. 5 Ves. jun. 264. *Price* v. *Gibson*, 2 Eden's Rep. 118; *Forbes* v. *Moffatt*, 18 Ves. 384; *Douisthorpe* v. *Porter*, 2 Eden's Rep. 162. For mergers are odious in equity, and never allowed unless for special reasons. *Philips* v. *Philips*, 1 P.

Wms. 41. But if the fee simple in law and equity, exist in the same person, there will be a merger of the equitable interest in the legal, *Wade* v. *Paget*, 1 Cox's R. 74. With respect to the doctrine of merger, as applied to copyhold estates for life or estates tail, see 15 Vin. Ab. title Merger (1). See *St. Paul* v. *Lord Dudley*, 15 Ves. 167.

CHAP. VII.

Of the Office and Duty of a Trustee.

SECTION I.

IT follows, that we treat of the office and duty of the trustee, and how far his power extends. And here regularly no act of the trustee shall prejudice the cestui que trust(*a*);

(*a*) This proposition, that no act of the trustee shall prejudice the cestui que trust, demands attention; I shall therefore consider the several modes by which prejudice might be induced by acts of the trustee, unless courts of equity interposed their protective jurisdiction in favour of the cestui que trust, and endeavour to point out to what extent courts of equity have interposed. The legal estate being in the trustee, he might prejudice his cestui que trust, by aliening, by incumbering, by altering, or by forfeiting the estate, or by refusing to accept the trust.

With respect to his power to prejudice his cestui que trust by alienation, the single case in which his alienation of the estate can bind the cestui que trust is, where, being in possession of the estate, he conveys it for a valuable consideration, and without notice; in which

but the trustee must, especially in equity, make good the trust (*b*). And the law seems

case the purchaser will be entitled to hold the estate against the cestui que trust; *Pye* v. *Gorge*, 1 P. Wms. 128. 1 Bro. P. C. 359; *Vernon* v. *Vandey*, Barnard. 303. *Watson* v. *Corbett*, Rep. Temp. Finch, 411. As to incumbrances, it seems agreed that mortgages for valuable consideration, and without notice of the trust, are to be considered as purchasers, a mortgage being a specific lien; but, as to specialty or judgment creditors, who have only a general lien, they are not in equity allowed to hold against the cestui que trust: *Finch* v. *Earl of Winchelsea*, 1 P. Wms. 278; *Medley* v. *Martin*, Finch's Rep. 63. As to what words in the will of a trustee will pass the trust estate, see *Marlow* v. *Smith*, 2 P. Wms. 201. *Casborne* v. *Scarfe*, 1 Atk. 603. *D. of Leeds* v. *Munday*, 3 Ves. 348. *Roe* v. *Reade*, 8 T. Rep. 120. *Standen* v. *Standen*, 2 Ves. jun. 589. *Ex parte Sergison*, 4 Ves. 147. *A. G.* v. *Buller*, 5 Ves. 339. *Ex parte Berteel*, 6 Ves. 578.

In considering the power of a trustee to change the nature of a trust estate, it may be material to distinguish those cases in which the cestui que trust is sui juris, from those in which he is not sui juris. In those cases in which the cestui que trust is sui juris, I take it to be clear that the trustee cannot change the nature of the estate; as by converting money into land, or land into money, at least so as to bind and exclude the cestui que trust from remedy against the trustee personally. But in those cases in which the cestui que trust is not sui juris, it is very frequently necessary to the interests of such a cestui que trust, that the trustee

to be the same of the act of God, for if the trustee of a legacy dies before the testator,

should be armed with such a power; and the true criterion in such cases is, whether the interests of the cestui que trust required the conversion. For the distinctions upon this point, see 1st vol. p. 88; and *Mason* v. *Day*, Pre. Ch. 319. *Pierson* v. *Shore*, 1 Atk. 480; *Witter* v. *Witter*, 3 P. Wms. 100, 101. *Rook* v. *Warth*, 1 Ves. 460; *Oxendon* v. *Lord Compton*, 4 Bro. Ch. Rep. 231. 2 Ves. jun. 69, 261. *Elwin* v. *Elwin*, 8 Ves. 547. That the trustees, postponing or accelerating the sale of the trust estate, shall not prejudice the cestui que trust, see *Hawkins* v. *Chapple*, 1 Atk. 623. *Sitwell* v. *Bernard*, 6 Ves. 520, and cases there cited. *Noel* v. *Lord Henley*, Ex. Jan. 1819. As to alienations by trustees for a charity, *Attorney General* v. *Green*, 6 Ves. 452. *Attorney General* v. *Owen*, 10 Ves. 562. *Attorney General* v. *Lord Dudley & Ward*, Rolls, Feb. 1815.

With respect to acts of the trustee which work a forfeiture of the estate, I shall blend the doctrine of forfeiture, which is an escheat pro delicto tenentis, with that of escheat ob defectum tenentis, conceiving that though there may be distinctions as to these points between the effect of forfeiture incurred by the cestui que trust in cases of treason and in cases of felony, there is none as to the trustee; for that the legal estate being in him, it is forfeited by his treason or felony, and also escheats pro defectu tenentis: but whether the forfeiture be subject to the trust, is a point upon which a difference of opinion seems to have prevailed. I am aware that Chief Baron Comyns, in his valuable Digest, title

this shall not prejudice the legatee (1). So if a trustee of land die without heir, though

(1) *Eales* v. *England*, Pre. Ch. 200. See also *Oke* v. *Heath*, 1 Ves. 135.

Forfeiture, B. 1. states, That "a man does not for high treason forfeit lands which he holds as trustee." But this opinion cannot be reconciled with those cases in which the only question has been, whether the legal estate being by the forfeiture vested in the crown, the crown was not bound to execute the trust in equity? In *Wikes'* case, Lane, 54, it was held that the crown was not so bound; so also, in Jenkins, 190, Ca. 92. Hard. 466, Bro. Feoffment al. Uses, pl. 31. Viner's Ab. Uses, pl. 4, in a note; and the general reason assigned is, that the king cannot be a trustee; see *Earl of Kildare* v. *Eustace*, 1 Ves. 439, contra. This series of authority is, however, supposed to be shaken by the dicta of Lord Bridgeman, in *Geary* v. *Bearcroft*, Carter, 67; Trevor, master of the rolls, in *Eales* v. *England*, Pre. Ch. 202; and as these dicta weighed with Lord Mansfield in the much celebrated case of *Burgess* v. *Wheate*, 1 Bla. Rep. 123, 1 Eden's R. 201. notwithstanding the observations upon them by the master of the rolls, Sir Thomas Clarke, it may be material to remark, that in Lord Bridgeman's own manuscript notes of his judgments, whilst Chief Justice of the Common Pleas, compositions far exceeding Carter's account of them in copiousness, depth, and correctness, more particularly in the case of *Geary* v. *Bearcroft*, there is not an iota which imports an opinion, that upon escheat the lord comes in subject to any trust. I am indebted for this observation to the liberal communication of Mr. Hargrave, who is in possession of the above manuscript.

And with respect to what is reported to have been

the lord by escheat will have the land at law: yet it shall be subject to the trust in equity (2). So if *A.* puts out 100*l.* at interest in the name of *B.* who after becomes a felo de se; *A.* may be relieved against the king upon this trust in equity, upon the statute of 33 H. VIII. cap. 39 (3). Yet if an equity of redemption is conveyed to *A.* in trust for payment of debts, and the surplus to *B.*, and *A.* agrees with the mortgagee to turn interest into principal; this agreement of the trustee shall bind *B.*

(2) *Eales* v. *England*, Pre. Ch. 200, 202. 1 Eq. Ca. Ab. note 384. *Geary* v. *Bearcroft*, p. Ld. Bridgeman, Carter, 67. But see note (a).

(3) *Hix* v. *Attorney General*, Hard. 176.

stated by Trevor, master of the rolls, it may be sufficient to remark, that it was an obiter dictum.

As to the refusal of a trustee to accept the trust, a court of equity will in such cases interpose, and either appoint new trustees or take upon itself the execution of the trust. See *Ellison* v. *Ellison*, 6 Ves. 663; as to trustees being out of the jurisdiction, see 36 G. III. c. 90.

(*b*) Lord Hobart is stated to have been of opinion, that an action at law might be maintained against the trustee for breach of trust; see 1 Eq. Ca. Ab. 384, in note; but this opinion is inconsistent with Lord Hardwicke's definition of a trust, which is, that it is such a confidence between parties, that no action at law will lie, but is merely a case for the consideration of courts of equity; *Sturt* v. *Mellish*, 2 Atk. 612. That the trustee is liable in equity for a breach of trust, was ex-

(4) *Conway* v. *Shumpton*, 19 Jan. 1711. 21 Vin. Ab. 512.
(5) *Earl of Chesterfield* v. *Lady Cromwell*, 1 Eq. Ca. Ab. 287.

though he was no party to it(4). And so an infant shall be bound in such case by the act of his trustee or guardian (5); for we must distinguish betwixt importunate gain, as if the account were stated every six months, on purpose to load it; and where the interest is run up to a bulky sum: for here interest ought to be allowed for delay and forbearance, as well as in any other case whatsoever.

pressly determined in *Vernon* v. *Vandrey*, Barnard. 303; but it is material to observe, that even in equity the cestui que trust is considered but as a simple contract creditor in respect of such breach of trust; *Vernon* v. *Vawdrey*, 2 Atk. 119, unless the trustee has acknowledged the debt to the trust estate under hand and seal. *Gifford* v. *Manley*, Forrest. 109.

SECTION II.

But it seems a certain rule, that what a trustee, or any other, is compellable to by suit, he may do without suit (*c*); as to join

(*c*) It seems scarcely necessary to observe, that considerable caution is requisite in the application of this

with cestui que trust in tail in a feoffment (1); for they are trustees merely to preserve his estate. So there being a remainder over in

(1) *Bowater v. Elly*, 2 Vern. 344.

rule: when a trustee does any act upon the notion that he would be compellable to do it by suit, he takes upon himself to decide what would be the decree of the court; and in such case he has no reason to complain, if made subject to any loss which his cestui que trust may have sustained from his having misapprehended the law of the court. But it may happen that a trustee may be correct in his apprehension of the law of the court; and yet not be justified in taking upon himself to proceed upon it without the sanction of the court; as where a grandfather having bequeathed the residue of his personal estate to his grandchildren at twenty-one, and directed the trustees to apply the produce in the mean time for the maintenance of such grandchildren, and the father was one of the trustees, who being known to the other trustees not to be of ability to maintain his children; one of the trustees expended 400*l.* in their maintenance, previous to any report as to the ability of the parent to maintain them; which disbursement Lord C. Thurlow refused to allow. *Andrews* v. *Partington*, 3 Bro. Ch. Rep. 60. Yet in such case, had the father been found not to be of ability to maintain his children prior to any application of the interest for such purpose, such application would, as of course, have been directed; but the trustee having taken upon himself to judge of the parent's sufficiency in such particular, was considered to have no right to an allowance, which the court would not have decreed without the previous inquiry, though he had drawn a correct conclusion as to what would have been the result of such inquiry. I am aware that this case is

trust to raise portions for daughters, if there were no issue, and there being a daughter, upon giving security for the daughter's portion, the trustees shall be compelled to join in the recovery (2). So trustees in a marriage-settlement for preserving contingent remainders, (there being no issue), may be decreed to join in a sale (*d*), the

(2) *Frewin* v. *Charlton*, 1 Eq. Ca. Ab. 386.

considered as a case of great hardship; (*Anon.* 10 Ves. 104.) I cannot however bring myself to think, but that the decision is necessary to secure to infants the full benefit of that protective interposition, which courts of equity are bound to afford them. The respectable character of the trustee who had applied the produce of the fund in the manner directed by the will, however it may dispose one to lament the effect, ought not to be allowed to influence the discussion, nor to control the application of the general rule. But see *Aspinal* v. *Aspinal*, 1786, in which case, such allowance seems to have been directed in the event of the father's appearing not of ability to maintain his child. *Rawlins* v. *Goldfrap*, 5 Ves. 440. *Sisson* v. *Shaw*, 9 Ves. 285. *Maberly* v. *Turton*, 14 Ves. 495. See also *Franklin* v. *Green*, 2 Vern. 137, in which the trustee was allowed an apprentice fee. But see *Smee* v. *Martin*, Bunbury, 136, contra.

(*d*) There are several other cases in which the court has exercised its discretion, by directing trustees to join in destroying contingent remainders, as in *Basset* v. *Clapham*, 1 P. Wms. 358, where the settlement was voluntary, and the bill was by creditors; so in *Winnington* v. *Foley*, 1 P. Wms. 536, where the new uses to be

settlement being only of an equity of redemption, and the wife consenting to the sale (3). But the husband and wife being married twelve years, and having no issue, the court will not force the trustees to join in a sale, though for payment of their debts; for that people have been married near twenty years without issue, and after have had children (4). And if trustees appointed to preserve contingent remainders, join in a conveyance to destroy the remainders before a son is born, this is a plain breach of trust; and whoever claims under this conveyance having notice of the trust, or by a voluntary settlement, shall be liable to make good the estates (5).

(3) *Platt* v. *Sprigg*, 2 Vern. 303.

(4) *Davis* v. *Weld*, 1 Vern. 181.

(5) *Mansel* v. *Mansel*, P. Wms. 684. Forrest. 259. *Pye* v. *George*, 1 P. Wms. 128. 1 Bro. P. Ca. 359.

limited upon the recovery were more beneficial to the family than the existing limitations. But, in the exercise of this discretion, the court proceeds with great circumspection; and, therefore, if the tendency of destroying the remainders be prejudicial to the family, the court will not direct the trustees to join, unless in the aforementioned cases. *Townsend* v. *Lawton*, 2 P. Wms. 379. *Symance* v. *Tattam*, 1 Atk. 613. *Woodhouse* v. *Hoskins*, 3 Atk. 22. *Barnard* v. *Large*, 1 Bro. Ch. Rep. 534. But though the court will in some cases refuse to direct the trustees to join, it will not in all such cases punish the trustee if he actually concur in barring the contingent remainders. See *Woodhouse* v.

Hoskins, 3 Atk. 22. As where, upon a subsequent remainder to the right heirs, a collateral relation only was affected by it. *Tipping* v. *Pigott*, 1 Eq. Ca. Ab. 385. See *Moody* v. *Walters*, 16 Ves. 283. 304.

SECTION III.

As to the allowances to be made to the trustee regularly (*e*) he is to have nothing for his own labour and pains, though some have thought this a great hardship (1). But if a trustee, sued concerning the trust in Chancery, obtain a dismission, and have costs paid him (*f*) as in course; but the

(1) *How* v. *Godfrey*, Rep. Temp. Finch, 361. *Palmer* v. *Jones*, 1 Vern. 144. *Robinson* v. *Pett*, 3 P. Wms. 250.

Scattergood v. *Harrison*, Mosely, 128, 130.

(*e*) But though a trustee is not in general entitled to an allowance for his trouble, quere, whether he may not, prior to his acceptance of the trust, stipulate for an allowance? See *Gould* v. *Fleetwood*, Mich. 1732, stated in a note, 3 P. Wms. 250. and *Ayliffe* v. *Murrey*, 2 Atk. 60. That the court would not give effect to such an agreement between mortgagor and mortgagee, see *French* v. *Baron*, 2 Atk. 120. But that an executor in India is entitled to the allowance which in India is made to executors for their trouble, see *Cheetham* v. *Ld. Audley*, 4 Ves. 74.

(*f*) If a trustee has not misbehaved, the rule is to allow him his costs; *Perrott* v. *Treby*, Pr. Ch. 254.

costs allowed him, and taxed, are short of his real costs; and after a bill is brought by cestui que trust, to have an account of his disbursements, he shall be allowed his true and necessary costs in the former suit, and not be concluded, &c. (2). And the law is the same of a mortgagee; for since the keeping only is given gratis, it is plain, that all the expences laid out upon the charge ought to be repaid (3). And although, where a mortgagee or trustee manage the estate themselves, there is no allowance to be made them for their care and pains; yet, if they employ a skilful bailiff (g), and give him 20*l.* per annum, that must be allowed,

(2) *Amand* v. *Bradburne*, 2 Ch. Ca. 138.

(3) See *Hethersell* v. *Hales*, 2 Ch. Rep. 83. *Ramsden* v. *Langley*, 2 Vern. 536.

But if he has misbehaved, the court will not make him such allowance. *Trix* v. *Quarterly*, MSS. 16 July 1786. And, query, if in a contested case, the court would not charge a trustee with the costs of a suit which his misconduct had occasioned? See *Perrott* v. *Treby*, Pre. Ch. 254. *Henley* v. *Philips*, 2 Atk. 48.

(g) Though a trustee may appoint a bailiff, it seems he is responsible for his sufficiency, unless the will or deed creating the trust empower the appointment; in which case, the trustee is only bound to see that his agent be a proper and solvent person at the time of appointment. *Sutton the Marshal's* case, 12 Mod. 560. See also *Routh* v. *Howell*, 3 Ves. 565.

for a man is not bound to be his own bailiff (4).

(4) *Bonithorn* v. *Hockmore*, 3 Vern. 316. *Godfrey* v. *Watson*, 3 Atk. 518.

SECTION IV.

NOR will the court ever charge a trustee with imaginary values, but he shall be charged as a bailiff only. And although very supine negligence might indeed in some cases charge a trustee with more than he had received, yet the proof must then be very strong (1). So a trustee for a charity is no otherwise or further chargeable, than another trustee is, viz. for so much as he receives (2). So a mortgagee shall only account for what he actually did make, or might have done (3), had it not been for his wilful default (*h*). And if a

(1) *Palmer* v. *Jones*, 1 Vern. 144. *Harnard* v. *Webster*, Sel.Ca.Ch. 53.
(2) *Mann.* v. *Ballett*, 1 Vern. 44.
(3) *Anon.* 1. Vern. 451. *Chamberlain* v. *Chamberlain*, 1 Ch. Ca. 258.

(*h*) The rule here stated appears to be the result of the cases upon the point; and what will amount to that degree of default which will charge a mortgagee beyond his receipts, must necessarily depend upon a variety of circumstances, not easily capable of enume-

trustee is robbed of the money he received, he shall be allowed it on account, the robbery being proved, although the sum is only proved by his own oath, for he was to keep it but as his own (4). So in case of a factor; for he cannot possibly have other proof (5). And so it seems of an executor. Nor is this without a good foundation in reason; for the contract is not for the trustee's, but the party's own advantage, and it was his fault to choose such a one. And the interruption of acts of friendship do not oblige to restitution (*i*). But otherwise

(4) *Morley* v. *Morley*, 2 Ch. Ca. 2. See *Routh* v. *Howell*, 3 Ves. 565.

(5) Co. Litt. 89, a. *Southcote*'s case, 4 Rep. 84, a.

ration. The more prominent instances of such default are where the mortgagee enters upon the estate, and thereby keeps the other creditors out, and yet allows the mortgagor to receive the rents and profits; in which case, he shall be charged with all the profits he might have received from the time he had notice of the subsequent incumbrances; *Coppring* v. *Cooke*, 1 Vern. 270; *Bentham* v. *Haincourt*, Pre. Ch. 30; *Maddox* v. *Wren*, 2 Ch. Rep. 109. See also *Duke of Buckingham* v. *Sir Robert Gayer*, 1 Vern. 258; *Chapman* v. *Tanner*, 1 Vern. 267. So if the mortgagee in possession, without assent of the mortgagor, assign his mortgage to an insolvent person, he shall answer for the profits received both before and after the assignment, though assigned for his own debt. 1 Eq. Ca. Ab. 328. c. 2.

(*i*) By the civil law, several distinctions appear to have prevailed upon this point. In contractibus inter-

of a carrier, for he hath his hire, and thereby implicitly undertakes the safe delivery of the goods committed to him (6).

(6) Co. Litt. 89, a. *Southcote's* case, 4 Rep. 83.

dum dolum solum, interdum et culpam præstamus: Dolum, in deposito; nam, quia nulla utilitas ejus versatur apud quem deponitur, merito dolus præstatur solus nisi forte et merces accessit; tunc enim (ut est et constitutum) etiam culpa exhibetur; aut si hoc ab initio convenit, ut et culpam et periculum præstet is, penes quam deponitur. Sed ubi utriusque utilitas vertitur, ut in empto, (ut) in locato, (ut) in dote, (ut) in pignore, (ut) in societate, et dolus et culpa præstatur. Dig. lib. 13. tit. 6, 5, 2. See Pothier, 1. p. 455. A further distinction also prevailed in the civil law upon this point. Commodatum autem plerumque solam utilitatem continet ejus, cui commodatur; et ideo verior est Quinti Mutii sententia, existimantis, et culpam præstandam et diligentiam. Dig. ubi supra. With respect to the distinctions upon this point allowed by the law of England, they are stated in the great case of *Coggs* v. *Bernard*, 2 Ld. Raym. 909, in which case, Lord Holt, C. J. observes, that there are six sorts of bailments, 1st. A bare naked bailment of goods delivered by one man to another, to keep for the use of the bailor; which he calls a depositum. 2dly, Where goods or chattels that are useful are lent to a friend gratis, to be used by him; and this is called commodatum, because the thing is to be restored in specie. 3dly, Where goods are left with the bailee, to be used by him for hire; which is called locatio and conductio. 4thly, When goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed; which is called a pledge. 5thly, When goods or chattels are delivered

to be carried, or something to be done about them for a reward to be paid to the bailee. 6thly, When there is a delivery of goods or chattels to somebody who is to carry them, or to do something about them gratis.

To those who have perused the admirable Essay on the Law of Bailments, by Sir William Jones, this subject, and the distinctions which belong to it, cannot but be familiar; to the reader who has not yet derived the satisfaction which that essay will communicate, to every mind possessed of good taste and nice discrimination, I beg to recommend that work, as illustrative of a truth too frequently contested, that the exertion and display of the most brilliant talents are not inconsistent with the severest and apparently least interesting investigations of points of jurisprudence.

SECTION V.

But where there are more than one, there is a difference between trustees and executors. For trustees have all equal power, interest and authority; and cannot act separately, as executors may, but must join, both in conveyances and receipts; for one cannot sell without the other, or desire to receive more of the consideration-money, or to be more a trustee than his partner.

And therefore it is against natural justice to charge them for each other's receipts, unless in case of necessity, where they so join in a receipt, as not to be distinguished what has been received by one, and what by the other, there, from their own neglect or default (*k*), both shall be charged with

(*k*) So where one trustee, having received the trust money, hand it over to his companion, he shall be charged; for where, by any act or by any agreement of a trustee, money gets into the hands of his companion, whether a trustee or co-executor, they shall both be answerable; *Sadler* v. *Hobbs*, 2 Bro. Ch. Rep. 116; *Keble* v. *Thompson*, 3 Bro. Ch. Rep. 112; *Hovey* v. *Blakeman*, 4 Ves. 596; *Chambers* v. *Minchin*, 7 Ves. 187; *Caffrey* v. *Darby*, 6 Ves. 488. But see *Attorney General* v. *Randall*, 21 Vin. Ab. 534. pl. 9; *Adams* v. *Claxton*, 6 Ves. 226. *Aplyn* v. *Brewer*, Pre. Ch. 173. *Leigh* v. *Barry*, 3 Atk. 584. *Fellows* v. *Mitchell*, 1 P. Wms. 81. So if a trustee privy to the embezzlement of the trust fund by his companion, he shall be charged with the amount; *Boardman* v. *Mosman*, 1 Bro. Ch. Rep. 68. *Bate* v. *Scales*, 12 Ves. 402. It may be material to observe, that the principle of the distinction between executors and trustees, extending to the assignees of a bankrupt, it has been held that the surviving assignee of a bankrupt is not chargeable for money received by his companion, though he join in the receipt, and although they agree, that the money from time to time received by them should be placed in the hands of a banker for safe custody. *Ex parte Singleton*, Aug. 10, 1791, stated in a note by Mr. Cox, 1 P. W. 84.

the whole (1). As if a man should blend his money with mine, by rendering my property uncertain, he loses his own. But executors have each an absolute power over the whole, and therefore if they join (*l*) they trust one another (2); et sic diversity. Yet a difference has been taken in the case

(1) *Fellowes* v. *Oxen*, 2 Vern. 504, 515. 1 P. Wms. 81. *Murrell* v. *Cox*, 2 Vern. 570. *Townly* v. *Sherborne*, Bridgem. 38. Cro. Car. 312. *Leigh* v. *Barry*, 3 Atk. 584. *Ex parte Belchier*, Ambl. 218. (2) *Churchill* v. *Lady Hobson*, 1 P. Wms. 241. *Aplyn* v. *Brewer*, Pre. Ch. 173. Duke's Charitable Uses, 66. *Ex parte Belchier*, Ambl. 219. *Scourfield* v. *Howes*, 3 Bro. Rep. 90. 1 Salk. 318.

(*l*) So if they agree that each of them shall have the management of a particular part of the estate, each shall be liable for the whole. *Gill* v. *Attorney General*, Hard. 314. With respect to the general proposition, it may be considered as considerably broken in upon, by Lord Northington's judgment in *Westley* v. *Clarke*; see 1 Eden's Rep. 300, and cases referred to in a note; but it is observable, that the determination in that case has been doubted; see *Sadler* v. *Hobbs*; but see also *Scourfield* v. *Howes*, 3 Bro. Ch. Rep. 90. It is, however, further observable that the case of *Westley* v. *Clarke* involved many circumstances, the particularities of which might be allowed to weigh without violence to the general rule.

of executors, as to creditors, and as to legatees (*m*).

(*m*) This distinction was treated by Lord Thurlow, Chancellor, in *Sadler* v. *Hobbs*, as a very old distinction; it seems, however, to have been taken and allowed in the case of *Gibbs* v. *Herring*, Pre. Ch. 49. *Brice* v. *Stokes*, 11 Ves. 324; *Lord Shipbrok* v. *Lord Hinchinbrok*, 16 Ves. 480.

SECTION VI.

And in an action of account, there must be either a privity in deed by the consent of the party, (as where he is his bailiff or receiver, for against a wrong-doer an account will not lie), or a privity in law ex provisione legis(*n*), as against a guardian(1).

(1) Co. Litt. 172, a.

(*n*) At common law, though an action of account could be maintained against a bailiff, receiver, or guardian, or in favour of trade between merchants, yet it could not be maintained by or against their representatives; Co. Litt. 90. b. The stat. 13 Ed. III. c. 23, therefore gave it to the executors of merchants; the 25 Ed. III. c. 5. extended it to the executors of executors; and 31 Ed. III. c. 11, to administrators; and now by 3 & 4 Anne, c. 16, it may be brought against executors and administrators of every guardian, bailiff, and receiver, and by one joint-tenant, tenant in common, his

And at law, if the defendant is charged as bailiff of goods and merchandize, he shall answer for the increase, and be punished for the negligence (*o*), and have his expences and factorage allowed him. But if he is charged as receiver ad computandum, he shall answer only for the money or thing

executors and administrators, against the other as bailiff for receiving more than his share, and against their executors and administrators. See Butler's N. Pri. 127. 6th ed. But though an action of account could not at common law have been maintained against the representatives of bailiffs, receivers, or guardians, yet a bill in equity for an account might be sustained; and such appears to have been the usual remedy, prior to the above remedial statutes. See 1 q. Ca. Ab. 5. note (*n*); and it is still considered as the most ready and effectual way to settle complicated accounts, as a discovery may thereby be had on the defendant's oath, without relying merely on the evidence which the plaintiff may be able to produce.

(*o*) That is, if he retain the fund in his hand, when he might improve it, 1 Rolle's Ab. 125. l. 40; or does not improve it so much as he might; 1 Rolle's Ab. 126. l. 1; or sell the goods purchased at an under rate; 1 Rolle's Ab. 126. l. 4; or upon credit without authority; *Anon.* 2 Mod. 100; or neglect to receive what he might have received. *Tebbs* v. *Carpenter*, 1 Mad. R. 290. But he shall be excused, if he can, upon oath, shew his conduct to have been regulated by prudent considerations; 1 Rolle's Ab. 126. l. 35; except when he exceeds his authority, as by giving credit. *Barton* v. *Sadock*, 1 Buls. 103. *Anon.* 2 Mod. 100.

(2) Rolle's Ab. 25. 1 Com. Dig. 102.

delivered (2). So in Chancery, an executor or trustee not being bound to lend, &c. if he do lend, it is at his peril (*p*); and

(*p*) The principle upon which this distinction proceeds is so inconsistent with every notion of the character and duty of a trustee, that it is extremely difficult to conceive how it acquired the weight which in some cases it appears to have received; see *Lynch* v. *Cappy*, 2 Ch. Ca. 35. and *Cartwright*'s case, 2 Ch. Ca. 21. *Ratcliffe* v. *Graves*, 2 Ch. Ca. 152. 1 Vern. 197, and *Adams* v. *Gale*, 2 Atk. 106. It was, however, very solemnly considered and denied to be the law of the court by Lord Thurlow, C. in *Newton* v. *Bennett*, 1 Bro. Ch. Rep. 359; so that an executor or trustee may now be considered as chargeable in equity with interest, whenever he appears to have made interest. *Perkins* v. *Bayntum*, 1 Bro. Ch. Rep. 375. *Treves* v. *Townshend*, 1 Bro. Ch. Rep. 384. *Pocock* v. *Reddington*, 5 Ves. 794, which is agreeable to many former decisions. *Radcliffe* v. *Graves*, 1 Vern. 196. 2 Ch. Ca. 152. *Lee* v. *Lee*, 2 Vern. 548. *Adee* v. *Feuilleteau*, 1 Cox's Rep. 24; See as to the rate of interest with which an executor shall be charged, *Hall* v. *Hallett*, 1 Cox's Rep. 134; as to annual rents, or interest upon all sums received or paid, see *Raphael* v. *Boehm*, 11 Ves. 92. But he shall not only be charged with interest, but if he appear to have employed his trust-money in trade, whence he has derived profits beyond the rate of interest, he shall account for the whole of such profits. *Brown* v. *Litton*, 10 Mod. 21. *Forbes* v. *Ross*, 2 Bro. Ch. Rep. 430; see also *Massey* v. *Davies*, 2 Ves. jun. 317. *Sammes* v. *Rickman*, 2 Ves. jun. 36. And it has further been held, that if a trustee or executor retain money in his hands for any length of time, which he might, by application to the court, or by vesting in the

if it be by that means lost, he shall answer the same out of his own estate, and therefore as he shall bear the loss he shall have the gain. But if a trustee or executor were an insolvent person at the time of placing out the trust money in the funds, or on other security, whereby he gains considerably, there the cestui que trust shall have the whole benefit gained thereby, as he only could have borne the loss, aliter e contra (3). And this is a fixed rule of the court, and they will not change it, even where the executor calls in the money on good security (*q*). So where a factor, who is in na-

(3) *Bromfield* v. *Wytherly*, 1 Eq. Ca. Ab. 398. Pre. Ch. 505.

funds, have made productive, he shall be charged with interest thereon. *Bird* v. *Lockey*, 2 Vern. 744. *Perkins* v. *Bayntum*, 1 Bro. Ch. Rep. 375. *Littlehales* v. *Gascoigne*, 3 Bro. Ch. Rep. 73. *Franklin* v. *Firth*, 3 Bro. Ch. Rep. 433. That an executor's investing money in the funds, and appropriating the same, shall not be liable to the fall of stocks, see *ex parte Champion*, cited in *Hutcheson* v. *Hammond*, 3 Bro. Ch. Rep. 147. *Franklin* v. *Firth*, 3 Bro. 433. *Cowper* v. *Douglas*, 2 Bro. 231. *Green* v. *Pigot*, 1 Bro. C. R. 105. *Soundy* v. *Binyon*, 3 Bro. C. R. 258.

(*q*) With respect to the right of an executor to call in a debt bearing interest, Lord Thurlow, Chancellor, conceived that an executor had an honest discretion so to do, if he thought the same in hazard. *Newton* v. *Bennet*, 1 Bro. Ch. 361. But see *Taylor* v. *Gerst*, Mosely 98.

ture only of a trustee for his principal in equity, though he has the right at law, upon his account, demanded according to custom allowance for so much paid for customs to the king in India, which it was insisted he had never paid, the factor shall have the benefit of the customs, for it was a duty to be paid, and the employer could make no title to it against him that was in possession, and he that has possession has right against all but him that has the very right (4). Otherwise of customs stolen from our own king; for that could not be called a custom, being grounded upon fraud, and therefore the court will order that defendant should answer, whether he paid the custom or not (5).

(4) *Smith* v. *Oxendon*, 1 Ch. Ca. 25. *Knipe* v. *Jessen*, 1 Ch. Ca. 76.

(5) *Borr* v. *Vandel*, 1 Ch. Ca. 80.

SECTION VII.

And if a trustee or executor compound debts or mortgages, or buy them in for less than is due upon them, he shall not take

the benefit of it himself(1), but other creditors and legatees shall have the advantage of it(r); and for want of them, the benefit shall go to the party who is entitled to the surplus. So of an heir(2), unless he brought it to protect an incumbrance to which he was entitled, or there be some special circumstances in the case. But if one acts for himself, and being not in the circum-

(1) *Anon.* Salk. 155. *Darey* v. *Hall,* 1 Vern. 49. *Plowman* v. *Plowman,* 2 Vern. 289.

(2) *Braithwaite* v. *Braithwaite,* 1 Vern. 334. *Long* v. *Clopton,* 1 Vern. 464.

(r) So if a trustee or executor obtain the renewal of a trust term, such renewal shall be for the benefit of the cestui que trust. *Holt* v. *Holt,* 1 Ch. Ca. 191. *Luckin* v. *Rushworth,* Finch. 392. *Moody* v. *Matthews,* 7 Ves. 176, and the cases there cited. Nor will the circumstance of the lessor having refused to renew to the cestui que trust, he being an infant, differ the case. *Keech* v. *Sandford,* Sel. Ca. Ch. 61. The principle of the decisions being, that a trustee shall not be allowed to raise in himself an interest opposite to that of his cestui que trust; upon which ground it has also been held, that a trustee or particular agent shall not be allowed to become the purchaser of that which he holds in trust; *Whelpdale* v. *Cookson,* 1 Ves. 9. *Morrett* v. *Paske,* 2 Atk. 4. *Whichcote* v. *Lawrence,* 3 Ves. 740. *Mussey* v. *Davis,* 2 Ves. jun. 317; *Twining* v. *Morrice,* 2 Bro. Ch. Rep. 329. *Crowe* v. *Ballard,* 3 Bro. 117. *Campbell* v. *Walker,* 5 Ves. 679. *Ex parte Lacey,* 6 Ves. 625. *Ex parte Hughes,* 6 Ves. 617. *Lister* v. *Lister,* 6 Ves. 631. *Attorney General* v. *Lord Dudley,* Rolls, Feb. 1815; unless the title afterwards appear to be in a third person; *Lesley*'s case, 2 Freem. 52; but see *Odlin* v. *Samborne,* 2 Atk. 15.

stances of a trustee or executor, buy in a mortgage for less than is due, or for less than it is worth, he shall be allowed all that is due upon the mortgage; for he stands in the place of him that assigned (3), viz. the mortgagee, who might have given it to him gratis; and what is due must be the measure of our allowance, and not what he gave, for that might have been more than it is worth, as well as less; and since he runs the hazard, if a loss happens, he ought to have the benefit, in case it turns to advantage. Yet the true reason seems to be this, that in the first case, he that takes upon him a trust, takes it for the benefit of the person for whom he is trusted, and not to take any advantage to himself. But in the latter, as far as he did not purchase, it was a free gift, and one man shall not profit himself of the contract of another. But where there are subsequent incumbrances or creditors in the case, there a man that buys in a prior incumbrance, shall be allowed only what he really paid (*s*), though

(3) *Phillips* v. *Vaughan*, 1 Vern. 336. *Morrett* v. *Paske*, 2 Atk. 54.

(*s*) The authority of the case, *Williams* v. *Springfield*, where this distinction was taken, was very much shaken by Lord Hardwicke's judgment in *Morrett* v. *Paske*, 2 Atk. 54; and see *Price* v. *De Burgh*, 13 Nov. 1791. 3 Dec. 1792, Rolls. 3 Ch. Rep. 23. 1 Vern. 335, 336.

there was in truth a greater sum due (5); for nemo ex alterius detrimento fieri debet locupletior, and therefore the taking away one man's accidental gain to make up another's loss, is making them both equal. But the owner or his representatives are no losers when they pay the whole money due.

(5) Francis's Maxims, Max. 3. p. 9.

49 1 Salk. 155. *Crowe* v. *Ballard*, 3 Bro. Ch. Rep. 120.

CHAP. VIII.

Of the Execution of the Trust.

SECTION I.

We will now shew how the trust shall be executed. And there may be many reasons why a court of equity would not decree a conveyance at all, (viz. of the legal estate by the trustees,) sometimes for a politic reason; as if it were to enable a nobleman to suffer a recovery, and leave the honour bare without estate (1), or if the party were a notorious spendthrift, or when the estate tail was only by implication. And so before the act, tortious and troublesome uses could not have been executed; for this court, which has the jurisdiction of trusts, will see that they do no mischief.

(1) *Sanders* v. *Neville*, 1 Eq. Ca. Ab. 392, 393.

SECTION II.

It is agreed on all hands to be a declared rule in this court, that if money be devised to be laid out in the purchase of lands to be settled on one and his heirs, the person himself for whose benefit the purchase was to be made may come into this court, and pray to have the money itself, and that no purchase may be made, because none have an interest in it but himself. But if he dies before the purchase made, or payment of the money (*a*), so that the question comes

(*a*) The circumstance of the money not being paid over to a cestui que trust absolutely entitled to it, affords an inference, that the cestui que trust intended it to continue liable to the real use; and upon that ground Lord Thurlow, Chancellor, proceeded in *Rashleigh* v. *Masters*, 1 Ves. jun. 201. 3 Bro. Ch. Rep. 99. But it may be material to remark, that this decision is not reconcileable with the case of *Curling* v. *May*, cited in *Guidott* v. *Guidott*, 3 Atk. 255. And though, from the cestui que trust not uniting the possession with the use, such an inference of intent could be raised, as between the heir and executor; yet as a mere inference it may be repelled by any circumstance affording evidence of a contrary intention, and therefore the fund would pass by particular description, as so much money to be laid out in land. *Cross* v. *Addenbroke*, and *Fulham* v. *Jones*,

between his heir and executors which of them shall have the money, the heir shall be preferred; and it shall for his benefit be considered in a court of equity, as if the purchase had been actually made in the life-time of his ancestor, for two reasons: 1st, Because the heir is to be favoured in

cited in *Lechmere* v. *Earl of Carlisle*, in 3 P. Wms. 224; or by a bequest of all the testator's estate in law and equity, or of all his estates whatsoever or wheresoever. *Rashleigh* v. *Masters*, 1 Ves. jun. 204. Provided he was adult, for otherwise he is not competent to elect that it shall be the one or the other. *Earlom* v. *Sanders*, Ambl. 242. *Car* v. *Ellison*, 2 Bro. Ch. Rep. 56. With respect to the cases in which a trust shall result to the heir, the particular purpose for which the land was directed to be converted into money having failed, see *Cruse* v. *Barley*, 3 P. Wms. 20, and Mr. Cox's note (1). where the cases are collected and referred to their respective principles; see also *Wheldale* v. *Partridge*, 5 Ves. 338. *Townley* v. *Bedwell*, 6 Ves. 194. That the court will not direct money to be laid out in freehold estate, which the trustees were empowered to lay out in freehold or leasehold, and which, if laid out in freehold, would have escheated to the crown pro defectu tenentis, see *Walker* v. *Denne*, 2 Ves. jun. 170. That equity will not change the quality which the property had at the death of the testator, as between the real and personal representatives, see *Chitty* v. *Parker*, 2 Ves. jun. 271; *Wentworth* v. *Young*, Vin. Ab. Executors, Ch. pl. 32. 2 Vern. 284. *Swann* v. *Fonnereau*, 3 Ves. jun. 41. See B. 2. c. 5. § 1. note (*a*). *Broome* v. *Monck*, 10 Ves. 621.

all cases, rather than the executors, who by the old law were to have nothing to their own use; 2dly, If the executors should have it, it would be against the words of the will, which gave it to the heirs (1). So if trustees in a will have power to sell the whole estate for payment of his debts, and that the residue should go to *A.* and *B.* his wife, as they by any deed, &c. should appoint. *A.* dies, and *B.* devises it to *C.* It must be considered in equity as if actually sold, and go accordingly; in which case the money would have gone to the husband, and so must the land too, else it would be in the power of trustees to make it land or money, and so to give it to whom they should think fit (2).

(1) *Scudamore* v. *Scudamore*, Pre. Ch. 544. *Chaplin* v. *Horner*, see also 1 P.W. 486. 1 vol. 413, 415, where this point is very fully considered.

(2) *Collingwood* v. *Wallis*

1 Eq. Ca. Ab. 396. *Davers* v. *Folkes*, 2 Eq. Ca. Ab. 396. *Silwell* v. *Bernard*, 6 Ves. 520.

SECTION III.

But it is now constantly held in Chancery, that if the lands are vested in trustees, to the use of one and the heirs of his body, with

remainder over, that the trustees are not to convey a fee but an estate tail, though he will have power to bar the entail when the conveyance is made to him, and it would avoid circuity. So if a sum of money be appointed to be laid out in a purchase, and the lands to be settled in tail, the purchase and settlement shall be made accordingly, and not the money paid the party (*b*); for the remainder-man has a chance for the estate, in case the tenant in tail in possession die without issue before any recovery suffered, which he may omit through ignorance or forgetfulness, or he may be prevented by death before he has completed it.

(*b*) See 40 Geo. III. c. 56. and B. 1. c. 6. s. 10.

SECTION IV.

And in the performance of a trust, the Chancery has a power to alter the disposition of the party upon emergent accidents,

which he did not foresee (c); and which if he had foreseen, he would in all probability have settled his estate otherwise. As where cestui que use willed, that his feoffees should convey to his daughters, and died, and after his death a son is born, the feoffees shall convey to him; because the cestui que use never intended to disinherit his heir at law (1). Nor is this court bound to decree according to the ordinary rules of law, in construction of wills, where the question in a devise arises upon the performance of a trust; as where *A.*, having two daughters and never a son makes feoffment to the use of his will, and devises his land to *J. S.* upon trust and confidence inter alia, for the raising the sums of money following, viz. if

(1) *Nourse* v. *Yarworth*, Rep. Temp. Finch. 159. *Hyde* v. *Seymour*, 2 Freem. 42.

(c) The case referred to is certainly an authority in support of our author's proposition, that in the performance of a trust, courts of equity will, upon certain events, alter the disposition of the party: And though the case gives a latitude of construction much beyond what our courts of equity would probably now consider themselves entitled to take, yet it does appear to have been referred to by Lord Nottingham, in *Hyde* v. *Seymour*, 2 Freem. 42, and to have received from his Lordship at least an indirect sanction of its principle. It was also referred to in *Hills* v. *Brewer*, 2 Vern. 104. sed non allocatur; see also *Winkfield* v. *Combe*, 2 Ch. Ca. 16, which refers to a case as strong in principle.

he has but one daughter, then 12,000*l.* to her fortune, if two or more, 20,000*l.* amongst them equally to be divided, the same to be due and payable at their several ages of twenty-one years or marriage, which shall first happen, with a provision for maintenance in the mean time. *A.* left three daughters, and one died under age, &c.; here being an apparent intention, that these two daughters should have 10,000*l.* a piece, this court will comply with it, notwithstanding any accident that might happen to the contrary.

SECTION V.

So where an executrix has a general power or trust to distribute a sum of money amongst children at discretion; an unreasonable and indiscreet disposition may be controlled in a court of equity. But otherwise where the power is special and particular; as that the wife might dispose to one or more; for this is casus provisus, and it is expressly provided, she might give all

to one (1). Yet it is now held discretionary in the court to relieve or not (*d*), since such clauses are for the most part to observe obedience only (2). So the power given by will to dispose of a personal estate by an executrix being general, to distribute to the

(1) *Thomas* v. *Thomas*, 2 Vern. 513.

(2) *Gibson* v. *Kinven*, 1 Vern. 66. *Wall* v. *Thurbane*, 1 Vern. 414.

(*d*) It is observable, that in the case of *Wall* v. *Thurbane*, 1 Vern. 414, the mother, to whom the power was given by the will of the father, had married a second husband, whose influence might have materially weighed in the unequal distribution which she made, and to that consideration, the interposition of the court is in some degree to be referred. For it were clearly too much to maintain, that a court of equity has a right of controlling the execution of a discretionary power of distribution among a definite description of persons, merely in respect of its being unequal; see *Burrell* v. *Burrell*, Ambl. 660. If it be grossly unreasonable, or induced by any irregular motive, then indeed the interference of a court of equity falls within the rule laid down in *Thomas* v. *Thomas*, 2 Vern. 513. See *Civil* v. *Rich*, 1 Ch. Ca. 309; *Clarke* v. *Turner*, 2 Freem. 198; *Menzey* v. *Walker*, Forrest. 72; *Maddison* v. *Andrews*, 1 Ves. 59; *Alexander* v. *Alexander*, 2 Ves. 640; *Pocklington* v. *Bayne*, 1 Bro. Ch. Rep. 450; *Boyle* v. *Bishop of Peterborough*, 1 Ves. jun. 310; *Spring* v. *Bills*, in a note, 1 Term. Rep. 435, which recognize this distinction. See also *Kemp* v. *Kemp*, 5 Ves. 849. As to what shall be considered as an excess in the execution of a power of appointment, see *Bristow* v. *Ward*, 2 Ves. jun. 336, where the cases upon the point are fully considered. See also *Butcher* v. *Butcher*, 9 Ves. 382. *Bax* v. *Whitbread*, 10 Ves. 31. 16 Ves. 15.

use of herself her brothers and sisters, according to their need and necessity; as in her discretion she should think fit; the heir shall have a double share, being most in need of it (3). And if one devise to two of his sisters 400 *l.* a piece, and to his third sister what his executors should think fit; the third sister shall have 400 *l.* also, and be made equal to her two other sisters, if the estate will hold out (4). So where the testator desires his executor to give 100 *l.* to *A.* if he thought fit; this seems to be a trust in his hands (5).

(3) *Warburton v. Warburton*, 2 Vern. 421.

(4) *Wareham v. Brown*, 2 Vern. 153.

(5) See B. 2. c. 5. note.

SECTION VI.

As for the general rule, that portions may be raised by the sale of reversionary terms in the life of the tenant for life, it cannot be got over; though on the other side there are cases where it has been refused. But this must depend upon the cirumstances of the deed, and the intent of the parties (1). And 1st, If a portion is directed to be paid at eighteen, or day of marriage, and the term

(1) *Corbett v. Maydwell*, 1 Salk. 159. 1 Eq. Ca. Ab. 337. 2 Vern. 656.

is absolutely vested, there the daughter shall not expect during the life of the father; but it may be sold in the father's lifetime, although a term in remainder and not in possession (*e*). 2dly, If the trust of the term had been upon a condition precedent, as to

(*e*) Although the cases referred to, *Graves* v. *Maddison*, *Corbett* v. *Maydwell*, *Gerrard* v. *Gerrard*, and *Staniforth* v. *Staniforth*, have never been directly overruled; yet in subsequent cases they have been considered as determinations in their principle, so replete with inconvenience, that they ought to govern only cases precisely similar in all their circumstances. See *Sandys* v. *Sandys*, 1 P. Wms. 707; *Hebblethwaite* v. *Cartwright*, Forrest. 31; *Hall* v. *Carter*, 2 Atk. 354; *Lyon* v. *Duke of Chandos*, 3 Atk. 416; *Smith* v. *Evans*, Ambl. 633; *Conway* v. *Conway*, 3 Bro. Ch. Rep. 267. In those cases, therefore, which can be distinguished from them, the court will not decree the portion to be raised in the life-time of the father or mother, as where all the contingencies have not happened; *Butler* v. *Duncomb*, 1 P. Wms. 448; *Reresby* v. *Newland*, 2 P. Wms, 93; or where maintenance is provided out of the rents and profits after the term limited to raise the portion, should take effect in possession; *Brome* v. *Berkley*, 2 P. Wms. 484; *Stevens* v. *Dethwick*, 3 Atk. 39; *Goodall* v. *Rivers*, Mosely, 395; *Churchman* v. *Harvey*, Ambl. 335; See *Codrington* v. *Lord Foley*, 6 Ves. 378, in which the cases upon the subject are very fully considered, and the rule stated by Lord Talbot, Forrest. 31, recognized as the proper rule; namely, that each case must depend upon the particular penning of the trust. As to the manner in which portions shall be raised, see B. I. c. 6. s. 18.

commence if the father die without issue male by his wife, in trust to raise portions for daughters; there, if the wife be dead without issue male, leaving a daughter, though the father is living, the term has been decreed to be sold. For in equity, the father is taken to be dead without issue, when the wife is dead, by whom he was to have issue; all that is contingent there has happened by the death of the wife without issue male; and the husband must also one time or other die, as all men must, and whenever he dies, he must die without issue male by that marriage, his wife being dead before. So that this is in truth a remainder, and depends no longer upon a contingency; and this court, as in some cases they do prolong the time, so here they have shortened it (2). And thus far the court has gone for convenience, that young women may have their portions, when they most want them; or else the father might live so long, that the portion might be of little service. 3dly, But if the agreement is, that the portion should be paid after his death, it is hard to make it payable in his life-time. For it would be to no purpose for any one to make deeds, if the argument of convenience or inconvenience should prevail to over-rule them, and

(2) *Graves* v. *Maddison*, Sir T. Jones, 201. *Gerrard* v. *Gerrard*, 2 Vern. 458. *Staniforth* v. *Staniforth*, 2 Vern. 460.

the cases on this head have gone too far already, and mangled all estates, and therefore they will never decree portions to be raised in the father's life-time, where it can possibly bear any other construction (3).

Butler v. *Duncomb*, 1 P. Wms. 448. 2 Vern. 760. *Reresby* v. *Newland*, 2 P. Wms. 33.

SECTION VII.

And there is no difference where the portion is secured by a settlement, or will, if secured out of a real estate (*f*), and the

(*f*) Nor is there any difference whether the land be the primary, or merely an auxiliary fund; *Yates* v. *Fettiplace*, 2 Vern. 416; *Jennings* v. *Looks*, 2 P. Wms. 276; *Prouse* v. *Abingdon*, 1 Atk. 482; *Van* v. *Clark*, 1 Atk. 510; *Richardson* v. *Greese*, 3 Atk. 69; *Sherman* v. *Collins*, 3 Atk. 319; *Harrison* v. *Naylor*, 3 Bro. Ch. Rep. 108; or whether the testator have or has only contracted for the land, or directed for the purchase of it; *Harrison* v. *Naylor*, 2 Cox's Rep. 247; nor whether the provision be for a child or a stranger; *Attorney General* v. *Milner*, 3 Atk. 113; *Gawler* v. *Standiwick*, 1 Bro. Ch. Rep. in a note, 106; nor, as was once supposed (see *Cave* v. *Cave*, 2 Vern. 508), whether it be given with or without interest; *Cave* v. *Cave*, 2 Vern. 508; *Rich.* v. *Wilson*, Mosely, 68; *Bradly* v. *Powell*, Forrest. 193; *Boycott* v. *Cotton*, 1 Atk. 555; *Gawler* v. *Standiwicke*, 1 Bro. Ch.

party dies before it is payable; in either case it sinks in the lands (1). But the dif-

(1) *Pawlett* v. *Pawlett*, 1 Vern. 204, 321. 1 Vern. 366. *Smith* v. *Smith*, 2 Vern. 92. *D. of Chandos* v. *Talbot*, 2 P. Wms. 610. *Gordon* v. *Raynes*, 3 P. Wms. 138.

Rep. (in a note,) 106, 2 Cox's R. 15; nor whether the sinking of the portion be for the benefit of the heir, or of a devisee; *Jennings* v. *Looks*, 2 P. Wms. 276; provided it be charged on real estate, and not payable until a future day. But if a future day of payment be not appointed, or a merely general discretion be given to raise the portion within a certain time; it appears to have been held in some cases, that the charge is immediately upon the death of the testator, a vested and transmissible interest; see *E. of Rivers* v. *E. of Derby*, 2 Vern. 72, and recognized in *Smith* v. *Smith*, 2 Vern. 92; *Cowper* v. *Scott*, 3 P. Wms. 119. *Wilson* v. *Spencer*, 3 P. Wms. 172. *Tunstall* v. *Brachen*, Ambl. 167. *Hodgson* v. *Rawson*, 1 Ves. 44. *Hutchins* v. *Foy*, Com. Rep. 716. *Emes* v. *Hancock*, 2 Atk. 507. *Manning* v. *Herbert*, Ambl. 575. *Emery* v. *Martin*, Ambl. 230. *Jeal* v. *Hitchener*, 4th July 1771. *Clarke* v. *Ross*, 22 Nov. 1773. *Kemp.* v. *Davy*, 1774; which cases are stated in a note, 1 Bro. Ch. Rep. 120. *Thomson* v. *Dow*, 1763. *Morgan* v. *Gardner*, M. 1777. *Godwin* v. *Munday*, 1 Bro. Ch. Rep. 191; but see *Norfolk* v. *Gifford*, 2 Vern. 208. *Brewin* v. *Brewin*, Pre. Ch. 195. *Tournay* v. *Tournay*, Pre. Ch. 290; in which cases such legacies were held not to be transmissible: see also *Warr* v. *Warr*, Pre. C. 213, in which case a portion to be raised for a child was not held transmissible, the child having died before it was raised, the trustees having a discretion to raise it when they thought fit. The apparent contrariety of decision upon this point must be referred to the nature of the subject. Courts of equity, looking for the intent of the parties

ference is between a personal legacy (*g*), which in such case being debitum in præsenti, though solvendum in futuro, and go-

are naturally influenced by a variety of prudential considerations, which cannot be brought within the range of any general rule; where the time of payment is prescribed with reference to the person, the rule of the civil law, causâ datâ non secutâ, may be reasonably applied; but where the time of payment is postponed, from the circumstances, not of the person, but of the fund, that rule cannot be applied without putting the general intent of the testator into hazard. *Emperor* v. *Rolfe*, 1 Ves. 208. To ascertain the real motive may be difficult; but whenever it can be ascertained that the time of payment was not made immediate, because it might overcharge the estate, it should seem to be too much to contend, that the heir at law, or devisee, should have the further advantage of the possibility of the legatee's dying before the time of payment. See *Lowther* v. *Condor*, 2 Atk. 130. *Sherman* v. *Collins*, 3 Atk. 319. *King* v. *Withers*, Forrest. 117. *Smith* v. *Partridge*, Ambl. 266. *Dawson* v. *Killet*, 1 Bro. Ch. Rep. 119. *Hope* v. *Lord Clifden*, 6 Ves. 499, and cases there cited. It is also an exception to the general rule, if the portion be made payable on one of two or more contingencies, and one of the contingencies happen in the life-time of the legatee, as where payable at 21, or marriage. *King* v. *Withers*, Forrest. 117.

(*g*) This distinction is established by a great number of cases, which are brought together by Mr. Cox. in his note (1), to the case of the *Duke of Chandos* v. *Talbot*, 2 P. Wms. 612. As to what words or circumstances will vest a legacy, see B. 4. c. 2. s. 4.

verned merely by the ecclesiastical law, which is so, shall go to the executor or administrator, and a sum of money appointed to be raised out of the rents and profits of lands, and designed for a particular purpose; as a portion for a daughter, payable expressly at twenty-one, or marriage, for which there was no occasion, she dying under age and unmarried.

PART THE SECOND.

Of Public Trusts.

CHAP I.

Of Charities.

SECTION I.

THE preservation of every private man's goods in particular, is the preservation of the commonwealth in general. And therefore in every good government, the magistrates ought to have a special care and regard of the estates of orphans, madmen, and prodigals. So, anciently in this realm, there were several things that belonged to the king as pater patriæ (1), and fell under the care and direction of this court; as charities (*a*), infants, idiots, lunatics, &c.

(1) *Lord Falkland* v. *Bertie*, 2 Vern. 342.

(*a*) Sir W. Blackstone observes, that "the king, as parens patriæ, has the general superintendence of all

afterwards, such of them as were of profit and advantage to the king, were removed to

charities, which he now exercises by the keeper of his conscience, the Chancellor. And, therefore, whenever it is necessary, the attorney general, at the relation of some informant, who is actually called the relator, files ex officio an information in the Court of Chancery, to have the charity properly established," 3 Com. 427. This proposition is too general; for, though it be true, that where a charity is established and there is no charter to regulate it, as there must be somewhere a power to regulate, the king has, in such case, a general jurisdiction; yet, if there be a charter with proper powers, the charity must be regulated in the manner prescribed by the charter, and there is no ground for the controling interposition of the court of Chancery. *Attorney General* v. *Middleton*, 2 Ves. 328. The interposition of the court, therefore, in those instances, in which the charities were founded on charters, or by act of parliament, and a visitor, or governor or trustees appointed, must be referred to the general jurisdiction of the court, in all cases in which a trust conferred appears to have been abused, and not to an original right to direct the management of the charity, or the conduct of the governors or trustees. A distinction manifested by those cases, in which the court has refused to interpose its opinion against that of the governors of a charity, having a right by the terms of its foundation to exercise their discretion in certain particulars. See *Attorney General* v. *Foundling Hospital*, 4 Bro. Ch. Rep. 165. 2 Ves. jun. 42. *Attorney General* v. *Middleton*, 2 Ves. 327. But see *Gower* v. *Mainwaring*, 2 Ves. 89. With respect to the right of visitation, see Highmore on Charitable Uses, in which work this point is very fully

the court of wards, but by the statute, upon the dissolution of that court, came back again to the Chancery. And although it was formerly doubted (2), if the court could by bill take notice of the statute of 43 Eliz. c. 4, for charitable uses, so as to grant a relief according to that statute upon a bill, but that the course prescribed by that statute, by a commission of charitable uses, must be observed in cases relievable by that statute (*b*); yet now it is agreed, that the

(2) *Attorney General v. Palmer*, 1 Cha. Ca. 157.

considered. As to 52 Geo. III. c. 101, by which charities may, as to abuses of trust, be relieved upon petition, see *Ex parte Rees*, 3 Ves. & B. 10. *Ex parte Berkhampstead Free School*, 2 Ves. & B. 134.

(*b*) As to what shall be deemed a charitable use, the stat. 43 Eliz. c. 4. enacts, that the commissioners shall inquire of the following uses as good and charitable, viz. For relief of aged and impotent and poor people; for maintenance of sick and maimed soldiers, schools of learning, free schools, scholars in universities, houses of correction; for repairs of bridges, of ports and havens, of causeways, of churches, of sea banks, of highways; for education and preferment of orphans, for marriage of poor maids, for support and help of young tradesmen, of handicraftsmen, of persons decayed; for redemption or relief of prisoners or captives, for ease and aid of poor inhabitants; concerning payment of fifteenths, setting out of soldiers, and other taxes; other gifts, provisions, and limitations, which, though not within the letter, have been held to be

Chancery may relieve upon an original bill in these cases (3). But a school for the inhabitants of *A.* not being a free school, is not a charity within the stat. of Eliz. (4), and consequently the inhabitants have not a right to sue in the Attorney General's name.

(3) *West* v. *Knight*, 3 Ch. Ca. 184. *Anon.* 1 Ch. Ca. 267.

(4) *Attorney General* v. *Hewer*, 2 Vern. 387.

within the purview of the statute, as money to maintain a preaching minister. *Attorney General* v. *Newcombe*, 14 Ves. 1, as to a protestant dissenting chapel. *Attorney General* v. *Fowler*, 15 Ves. 85, to maintain a schoolmaster, (but query, if the latter cases are not immediately within 1 Ed. VI. c. 14?) So for the building of an hospital for the relief of poor people. See *Vaughan* v. *Farrer*, 2 Ves. 187. So for the king to found a free school, and make it a corporation of guardians, masters and ushers, to give charity to them and theirs for necessaries to maintain them, and certain poor people under them. So for the building a sessions-house for a city or county, the making of a new or repair of an old pulpit in a church, or the buying of a pulpit-cloth or pulpit cushion, or the setting up of new bells where none are, or amending them where they are out of order. Duke's Charitable Uses, 109. *Turner* v. *Ogden*, 1 Cox's R. 316. So a devise of money to a minister to preach an annual sermon, and keep a toombstone and inscription in repair, and to a corporation for keeping accounts thereof, is a charitable use, and, if charged on land by will, is within 9 Geo. II. c. 36; *Durour* v. *Motteux*, 1 Ves. 320. See also *Grieves* v. *Case*, 4 Bro. Ch. Rep. 67; *Townley* v. *Bedwell*, 6 Ves. 194. As to operation of the statute with reference to locality of property, see *Mackintosh* v. *Townsend*. 16 Ves.

330. *Campbell* v. *Earl of Radnor*, 1 Bro. C. R. 271. *Oliphant* v. *Hendrie*, 1 Bro. Ch. R. 571. As to secret trusts of lands for charities, see *Edwards* v. *Pike*, 1 Eden's Rep. 267. *Boson* v. *Statham*, 1 Eden's Rep. 508. *Muckleston* v. *Brown*, 6 Ves. 52; 9 Ves. 517; 18 Ves. 475.

SECTION II.

AND tenant in tail may dispose of a charity out of his land, without fine or recovery, and even by will, by virtue of the construction which has been made on the 43 Eliz. the statute of charitable uses supplying all defects of assurance (*c*), either in the giver

(*c*) Though it be true that, where the uses are charitable, and the person has in himself full power to convey, the court will aid a defective conveyance to such uses, yet such uses or trusts must be declared in writing, or be established by such evidence as is necessary in other cases of trust. *Adlington* v. *Cann*, Barnard. 130. Highmore's Charitable Uses, 67, first edition. *Attorney General* v. *Spillet*, Highmore, 68. *Muckleston* v. *Brown*, 6 Ves. 52. It may also be material to remark that the capacity of the party to convey making a term in the general proposition, infants, lunatics, or femes coverts, are not within it. Duke's Charitable Uses, 110. *Jesus College* case, Duke 78. *Collison's* case, Hob. 136.

or receiver, where the donor is of capacity to dispose, and hath such an estate as is any way disposable by him, whether by fine or recovery; for the intent of the statute of charitable uses was to make the disposition of the party as free and easy as his mind, and not to oblige him to the observance of any form or ceremony (1). But if a man dispose of a charity by will, and such will wants the necessary circumstances required by the statute of frauds and perjuries, it shall not operate as an appointment (2); for the statute of 43 Eliz. is now repealed pro tanto, and though there were three subscribing witnesses to the codicil, yet that would not support the will. But as to such of the lands as were copyhold, it was agreed, they were well appointed, they passing by surrender, and not by the will (3). So a devise in mortmain is good (*d*) as an ap-

(1) *Tay* v. *Slaughter* Pre. Ch. 16. *Attorney General* v. *Rye*, 2 Vern. 453. *Attorney General* v. *Burdett*, 2 Vern 755. Case of *Christ College, Cambridge*, 1 Bla. Rep. 90.

(2) *Attorney General* v. *Baynes*, Pre. Ch. 270. 2 Vern. 597. *Jenner* v. *Harper*, Pre. Ch. 389.

(3) Herne's Charit. Uses, ch. 6. ca. 14, 15, 16. *Attorney General* v. *Baynes*, 2 Vern. 598. *Attorney General.* v. *Andrews*, 1 Ves. 225. See 1 vol. b. 1. c. 1. s. 7.

(*d*) A devise in mortmain is not within the statute of wills; and therefore a devise to a charity was allowed to take effect, as an appointment in order to effectuate the intent of the party, who in his life-time might have conveyed it to such charitable use. See 34 and 35 Hen. VIII. c. 5. § 4, 5. As to the history and progress of laws prohibitory and restrictive of conveyances in mortmain, see 2 Bla. Com. 268, and Highmore's Charitable Uses.

pointment to a charity within the 43 Eliz. (4). But see now the late statute 9 Geo. II. c. 36 (e)

(4) *Flood's* case, Hob. 136. *The King* v. *Newman*, 1 Lev. 284.

(s) The legislature finding that the political ends of the statutes of mortmain were frequently defeated, by the large and improvident dispositions made by persons on their death-beds, even for purposes in themselves laudable, by the statute of 9 Geo. II. c. 36, enacted, That no manors, lands or tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estates whatsoever, to be laid out in the purchase of lands, &c. shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or anywise conveyed or settled to or upon any person or persons, bodies politic or corporate or otherwise, for any estate or interest whatsoever, in trust, or for the benefit of any charitable uses whatsoever, unless by deed indented, executed in the presence of two witnesses, twelve calendar months before the death of the donor or grantor, including the days of the execution or the death, and enrolled in the Court of Chancery, within six months after its execution; and unless such stocks be transferred in the public books, usually kept for the transfer of stocks, six calendar months before the death of such donor or grantor, including the days of the transfer and death, and unless the same be made to take effect in possession for the charitable use intended immediately from the making thereof, and be without any power of revocation, reversion, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under

him; provided always, that such limitations, &c. shall not be construed to extend to any purchase or transfer made for valuable consideration; the statute then declares all other gifts, grants, conveyances, transfers, &c. to be null and void, with a proviso that it shall not be construed to extend to the two universities, their colleges, (this exception applies only to colleges then established, and to devises for their benefit. See *Attorney General* v. *Tancred*, 1 Eden's Rep. 16; but see also *Attorney General* v. *Bowyer*, 3 Ves. 728,) and the scholars upon the foundation of the colleges of Eton, Winchester, or Westminster; such exceptions are, however, subject to the proviso, that no college shall, from June 1736, be at liberty to purchase, acquire, receive, take or hold more advowsons than are equal in number to one moiety of the fellows or students upon the respective foundations: and the act further provides, That nothing therein contained shall be construed to extend to the disposition, grant, or settlement of any estate, real or personal, lying or being within that part of Great Britain called Scotland." It is not a little extraordinary, that an act so distinctly presenting its principle and purpose, should have given rise to so great a number and variety of cases as this act appears to have done. Mr. Highmore has brought them together, and has stated them so fully, that I shall content myself with stating the general result of them.

1st, It has been held, that the restrictions of this act do not apply to wills made before the passing of it, though the testator did not die till afterwards. *Ashburnham* v. *Bradshaw*, 2 Atk. 36. Barnard 6. *Attorney General* v. *Lloyd*, 1 Ves. 33. *Willet* v. *Sandford*, 1 Ves. 178. *Attorney General* v. *Hawes*, Feb. 1793. *Attorney General* v. *Bradley*, 1 Eden's R. 482. But see *Attorney General* v. *Heartwell*, Ambl. 451. *Attorney General* v. *Downing*, Ambl. 550.

2dly, As manors, lands, rents, *&c.* are directly within the statutes, and as a devise of money to arise by sale or otherwise out of land is construed a devise of the land itself, *Attorney General* v. *Lord Weymouth,* Ambl. 20, devises, charges, trusts, sums of money, *&c.* devised out of land to a charitable use, are void. *Dalton* v. *James,* cited in *Mogg* v. *Hodges,* 2 Ves. 52, and *Arnold* v. *Chapman,* 1 Ves. 108. That the words of the act are construed to extend to terms, see *Attorney General* v. *Graves,* Ambl. 155. *Attorney General* v. *Tomkins,* Ambl. 216. That it extends to mortgages, see *Attorney General* v. *Meyrick,* 2 Ves. 44; *Attorney General* v. *Graves,* Ambl. 155; *Attorney General* v. *Caldwell,* Ambl. 635; *White* v. *Evans,* 4 Bro. Ch. R. 21.

3dly, A bequest of money, goods, chattels, stocks, securities for money, or any other personal estate, to be laid out in the purchase of lands, &c. to a charitable use, is by the statute expressly declared to be void, but, as the bequest of money generally would be good, so a bequest of money, &c. to be laid out in lands or *otherwise* to a charitable use, has been supported, *Soresby* v. *Hollins,* 6th August 1740, and *Gragson* v. *Atkinson,* 7th November 1752, cited in Ambl. 211, 212. *Curtis* v. *Hutton,* 14 Ves. 537. *Attorney General* v. *Williams,* 2 Cox's R. 387. See also *Grimmett* v. *Grimmett,* Ambl. 210, which recognizes the principle upon which the two above cases were decided, and gives it an additional extent, by holding, that though the trustees have not an express power given them to invest in the funds, or otherwise, yet, if they are not expressly directed to invest the money in lands, but have a discretion to leave it invested in the funds until they can to their satisfaction invest it in lands, the court will consider such power to be merely nugatory; for, whilst the act of Geo. II. is in force, they cannot invest in lands,

without a breach of trust. But see *English* v. *Ord*, 9th July 1754, stated in Highmore, 82, and *Grieves* v. *Case*, 1 Ves. jun. 548, in which it was held, that if the clause was directory, and not discretionary, though the discretion, if pursued, in such extent, would be against law, that made the devise void. *Grieves* v. *Case*, 2 Cox's R. 301. But a gift by will of money to be laid out in repairing a chapel already built, or to erect on land already in mortmain, is not within the statute. *Glubb* v. *Attorney General*, Ambl. 373; *Harris* v. *Barnes*, Ambl. 651; *Brodie* v. *Duke of Chandos*, cited in Ambl. 751; *Attorney General* v. *Bowles*, 2 Ves. 547. 3 Atk. 806; *Attorney General* v. *Bp. of Chester*, 1 Bro. Ch. Rep. 444, and cases stated in Appendix, p. 29; *Gastril* v. *Baker*, cited in Ves. 185; *Attorney General* v. *Nash*, 3 Bro. Ch. Rep. 588. But if the land is to be purchased out of the fund bequeathed, the bequest is void; *Attorney General* v. *Tindall*, Ambl. 614; *Attorney General* v. *Hutchinson*, Dick. 518, and *Chapman* v. *Brown*, 6 Ves. 404. *Foy* v. *Foy*, 1 Cox's R. 163. *Pelham* v. *Anderson*, 2 Eden's R. 296. That a bequest of real and personal estate to a trustee, to take a house for a school to educate children and grand-children of particular persons, and other children, is good as to the particular objects, but bad as a general charity, see *Blandford* v. *Fackerell*, 4 Bro. C. R. 394. 2 Ves. jun. 238.

4th, Though a direct devise of land to a charitable use, or of money charged on land, is void; yet a bequest of money, charged on both the real and personal estate, though void as to the real, is good as to personal estate; and the court, though it will not marshal assets for the sake of a charity; *Arnold* v. *Chapman*, 1 Ves. 108; *Mogg* v. *Hodges*, 2 Ves. 52; *Walter* v. *Child*, 2 Ambl. 524; yet it would formerly, to support the be-

quest, arrange the different species of personal estate; *Attorney General* v. *Caldwell*, Ambl. 635; *Negus* v. *Coulter*, Dick. 326. Amb. 367; *Campbell* v. *Earl of Radnor*, 1 Bro. Ch. 271. But this rule is now otherwise; see *Attorney General* v. *Winchelsea*, 3 Bro. Ch. R. 373; *Makeham* v. *Hooper*, 4 Bro. Ch. Rep. 156. The court will, however, direct the charge of legacies and debts to be borne by the different species of personal estate pro rata. *A. G.* v. *Winchelsea*, 3 Bro. Ch. R. 373.

SECTION III.

BUT whenever any thing is given to charity, and no charity appointed (1), or if the charity which is appointed be superstitious (*h*), there (*i*) the king shall appoint.

(1) *Attorney General* v. *Sederfin*, 1 Vern. 224. *Mills* v. *Freeman*, 1 Meriv. 55. *Anon.* 2 Freem. 261. *White* v. *White*, 1 Bro. Ch. Rep. 15. *Attorney General* v. *Herrich*, Ambl. 712. and cases there cited.

(*h*) As to what may be considered a superstitious use, see Duke's Charitable Uses, 105. Ambl. 107, 108. *Adams and Lambert's* case, 4 Rep. 104. *De Costa* v. *De Pas*, Ambl. 228. As to bequests void in England but good abroad, where the will was made, see *Vita* v. *Franco*, Rolls, Feb. 1816.

(*i*) By 1 Ed. VI. c. 14, gifts to certain superstitious uses therein enumerated, are declared to vest in the crown; but see *Adams and Lambert's* case, 4 Rep. 104; other gifts, though void as to the superstitious use, shall neither vest in the crown nor in the heir, but shall be appointed to such uses as the king shall order. *Rex* v.

And although a devise cannot be averred to be a superstitious use, by reason of the statute of frauds, yet the king is not bound

Lady Portington, 1 Salk. 162. But see *Porter*'s case, 1 Rep. 26, a. With respect to gifts to charitable uses, where no specific description of object be pointed out, the Court of Chancery will, in respect of the general charitable purpose appearing, direct the mode of giving it effect. *Attorney General* v. *Herrick*, Ambl. 712; *Attorney General* v. *The Painter's Company*, 2 Cox's R. 56; and this is agreeable to the rule of the civil law, which is so peculiarly favourable to charities, that legacies to pious or public uses shall not fail from the want of certainty as to the particular object intended. See Domat, 2 V. p. 161, 162. If not only the general purpose appear, but also a particular description of persons or objects be referred to, though as between such persons or objects the party has made no selection, yet the court will confine its discretion in supplying such omission within the limits of such general description; *White* v. *White*, 1 Bro. Ch. Rep. 12; *Moggeridge* v. *Thackwell*, 3 Bro. C. Rep. 517; *Attorney General* v. *Clarke*, Ambl. 422; *Waller* v. *Childs*, Ambl. 524. *Attorney General* v. *Wansay*, 15 Ves. 231. If the object of the gift be certain, but not at present in existence, yet if its existence may be expected hereafter, the court will neither consider the gift lapsed, nor apply it to a different use; *Aylett* v. *Dodd*, 2 Atk. 238. *Downing College* case, Ambl. 550, 571; *Attorney General* v. *Oglander*, 3 Bro. Ch. Rep. 166. But if the charity or object of the gift be precisely pointed out, and fail, it seems then in general it shall not be applied to any other; *Attorney General* v. *Bp. of Oxford*, 1 Bro. C. R. 379; *Attorney*

by that statute (2). So of an uncertain (3) as well as void use; for the use is void, and not the charity, yet in the case of a superstitious use, the appointment shall be to a charitable use, ejusdem generis (4); for the appointment of that good use to which it shall be applied, is a judicial act, and ought to be according to the rules of the court. And although the charity cannot take place according to the letter, yet it ought to be performed cy pres, and the substance pursued. But where the appointment is good, it shall not be in the power of the heir by his consent to alter the disposition of his ancestor; for they shall be held to the letter of the charity (5). Much less of the devisee as the parishioners (6).

(2) *Rex* v. *Lady Portington*, 1 Salk. 262.
(3) *Jones* v. *Peacock*, Rep. Temp. Finch, 245. *Attorney General* v. *Hickman*, 2 Eq. Ab. 193, 194. *Doyle* v. *Attorney General*, 4 Vin. Ab. 485. pl. 16. *Widmore* v. *Woodroffe*, Ambl. 639. *White* v. *White*, 1 Bro. Ch. Rep. 12. *Moggeridge* v. *Thackwell*, 3 Bro. Ch. Rep. 517.
(4) *Attorney General* v. *Baxter*, 1 Vern. 248. *Attorney General* v. *Guise*, 2 Vern. 266.

(5) *Attorney General* v. *Plott*, Rep. Tem. Finch. 232. *Attorney General on behalf of Peter House, Cambridge* v. *Regius Professor*, 1 Vern. 55. *Attorney General* v. *Christ Hospital*, 3 Bro. Ch. Rep. 165. (6) *Man* v. *Ballet*, 1 Vern. 42; but see *Attorney General* v. *Hart*, Pre. Ch. 225.

General v. *Goulding*, 2 Bro. Rep. 429. But see also *Attorney General* v. *City of London*, 3 Bro. C. R. 171. 1 Ves. jun. 243. *Shanley* v. *Baker*, 4 Ves. 732.

SECTION IV.

AND where, in the constitutions for founding an hospital, it was ordained, that no lease should be made for above twenty-one years, and the rent not to be raised, nor above three years rent taken for a fine, though the tenant of the hospital lands is entitled to a beneficial lease upon renewal, the constitution being just and charitable, for the encouragement of the tenant; yet this constitution is not to be followed according to the letter, but in the reason of it (*k*), as fines alter, and the price of provisions increase, so the rent ought to be raised in proportion (1). So if the hospital makes a lease for twenty-one years, with a

(1) *Watson* v. *Hinsworth Hospital* 2 Vern. 596.

(*k*) By the statute 13 Eliz. c. 10, corporations are restrained from granting long leases, &c. of their lands, as such leases would be as mischievous as the alienations of their possessions; and as a perpetual renewal upon particular terms would be equivalent to an alienation, the court will not enforce such a covenant. *Somerville* v. *Chapman*, 1 Bro. Ch. Rep. 61. *Attorney General* v. *Green*, 6 Ves. 452. *Attorney General* v. *Owen*, 10 Ves. 555. *Attorney General* v. *Backhouse*, 17 Ves. 283.

covenant by renewal to make it up sixty years, and by deed of covenants the lessee covenants to pay all additional rents; this covenant is not binding in equity, as being equally prejudicial to the hospital, as a lease for sixty years. And the corporation are but trustees for the charity, and might improve for the benefit of the charity, but could not do any thing to the prejudice of the charity in breach of the founder's rule (*l*). But the additional rent and arrears shall be paid during the term of twenty-one years; for though it was an indenture of mutual covenants on the lessor's part to renew, and on the lessee's part to pay the additional rent, those covenants appeared in the deed to have been made on distinct considerations, viz. the covenant for increase of rent, because the price of provisions was raised, and the covenants for renewal, because the lessee undertook to lay out 100*l.* in buildings (2).

(2) *Lydiat* v. *Foach*, 2 Vern. 410.

(*l*) If therefore the contract of the corporation exceed its powers, and injury result to the party with whom they contracted, his remedy must be against the individuals signing the contract, and not against the corporation. *Taylor* v. *Dulwich College*, 1 P. Wms. 655.

SECTION V.

And if *A.* seised of a manor, of the yearly value of 240*l.* devises several legacies, and particularly to his heir at law 40*s.* and then adds, that being determined to settle for the future, after the death of me and my wife, the manor of *F.* with all lands, woods, and appurtenances to charitable uses, I devise to *M. N.* &c. upon trust, that they shall pay yearly, and for ever, several particular sums to charitable uses, amounting in the whole to 120*l.* per annum, and gives the trustees something for their pains; there being an overplus, it shall go in augmentation of the charities (1), it appearing to be the testator's intent to settle the whole manor, and that the heir should have no more than the 40*s.* (*m*). So where the re-

(1) *Arnold* v. *Attorney General*, Show. P. C. 22. The case of *Thetford School*, 8 Re. 130. *Attorney General* v. *Johnson*, Ambl. 190. *Attorney General* v. *Sparks*, Ambl. 204. *Attorney General* v. *Tonner*, 2 Ves. jun. 1.

(*m*) In the case of *Arnold* v. *Attorney General*, it was attempted to distinguish that case from the case of *Thetford School*, by the circumstance of the whole fund having been devised in the latter instance, and the increase of it being subsequent to the death of the testator, and accidental; whereas in the former case

version in fee of divers lands let on leases on which in all 70*l.* per annum was reserved, was granted by King II. VIII. to the Corporation of Coventry, 400*l.* of the purchase-money was paid by the corporation and 1,000*l.* by Sir *T. W.*, but in the grant, the corporation was said to be the purchasers, and it was by the deed declared that the whole 70*l.* per ann. should be applied to several charities therein mentioned, the leases expiring, the value of the

the particular uses and bequests did not exhaust the whole of the fund; but such distinction was over-ruled. It is also observable that in the *Thetford* case there was no legacy to the heir at law; whereas in the case of *Arnold* v. *Attorney General*, there was. The principle therefore seems to be as stated in the case of *Thetford School*; that as the charity must have borne the loss if the value of the thing devised had decreased, it shall enjoy the benefit of its increase; and the court will even extend the bounty beyond the number of objects specified by the testator, provided they be of the same description with those pointed out by the testator. *Attorney General* v. *Haberdashers' Company*, 4 Bro. Ch. Rep. 103, *Attorney General* v. *Earl of Winchelsea*, 3 Bro. Ch. Rep. 373. *Attorney General* v. *Hurst*, 2 Cox's R. 365. or will increase the bounty limited to the objects; *Attorney General* v. *Minshull*, 4 Ves. 11. Whether heir or devisee shall have benefit of a void devise, see *Jackson* v. *Hurlock*, Ambl. 487. *Gravenor* v. *Hallum*, Ambl. 643. *Wright* v. *Row*, 1 Bro. Ch. Rep. 61. *King* v. *Denison*, 1 Ves. & B. 260.

lands were greatly increased, but the surplus had been all along received by the corporation of *C.* the lands themselves not being given to the charities, but particular rents out of the lands; and it was strongly insisted that the articles mentioning the corporation to the purchasers, there could be no averment received to the contrary; and although a charity is not barred by length of time (*n*), or any statute of limitations, yet it is an evidence, that the surplus belonged to *C.* because they have enjoyed it ever since the purchase, but the defendants were ordered to account for the improved value of the land, and the charities to be augmented in proportion (3).

(3) *Attorney General* v. *Mayor, &c. of Coventry*, 2 Vern. 397. *Attorney General* v. *Ld. Dudley*, Rolls, Feb. 1815.

(*n*) See the case of *St. Michael's Parish, Bath*, against the *Corporation of Bath*, Ch. T. T. 1798, in which the possession of the corporation for many years, was held to afford a strong presumption against the claims of the parish.

CHAP. II.

Of Guardians of Infants and Lunatics.*

SECTION I.

THE king is also an universal guardian to infants, and ought in the court of Chancery

* There are in law several kinds of guardians.

As, 1st, jure naturæ, the father of his heir apparent till twenty-one; and this was inseparable from his person.

2dly, In soccage, jure gentium, the next of kin to whom the lands could not descend; and this was only of things that lie in tenure till fourteen. Of others he might choose a guardian, if he was of years to make a choice.

3dly, By the statute of 12th Car. II. cap. 24, formed by Sir Matthew Hale; and this is in office and interest much the same with a guardian in socage. But it extends not to his lands by descent only, as that did, but to all his estate whatever, and may be till twenty-one or any less time.

4thly, By custom, as in London, and other boroughs.

5thly, The spiritual court, of personal estate only.

6thly, The king, for allegiance and protection are reciprocal.

to take care of their fortunes (*a*). As, 1st, If they marry during their minority, to

(*a*) "How this jurisdiction was acquired by the Chancellor, it is not easy, says Mr. Hargrave, (Co. Litt. 128. note) to state. The usual manner for accounting for it appears very unsatisfactory. See *Earl of Shaftesbury*'s case, Gilb. Rep. 172. saying, that his jurisdiction over idiots and lunatics is undoubted, furnishes an argument against his having any over infants; for he derives the former from a separate commission under the sign manual, but there is not any such to warrant the latter. The writs of ravishment of ward, and de recto de custodia, prove as little; for were not these returnable in the courts of common law, or though they had not been so, how doth a jurisdiction to decide between contending competitors for the right of guardianship prove a power of appointing a guardian when it happens that one is wanting. The writs de custode admittendo only relate to guardians ad litem. Reg. Bre. Orig. 198, a. The assertion that the appointment of guardians belonged to the Chancellor before the erection of the court of wards, remains to be proved, or at least we, after a diligent search, do not find any authority in point. The passage referred to in Fleta, and the doctrine in *Beverly*'s case, 4 Co. by no means warrant the use made of them; for in neither is any notice taken of infants. Though, continues Mr. Hargrave, the case of infants, as well as of idiots and lunatics, should be admitted to belong to the court, yet something farther is necessary to prove that the Chancellor is the person constitutionally delegated to act for the king. It is no wonder, therefore, that Lord Hardwicke took occasion to disapprove of comparing the court's jurisdiction over infants with that

procure a settlement (*b*); for, though by the ecclesiastical law, a woman is of age to

over idiots and lunatics; *ex parte Whitfield*, 2 Atk. 315. As to the writs in the register, continues Mr. H., relative to the appointment or removal of guardians, they merely relate to suits, which is of very different consideration from general guardians. See Index to Reg. Brev. Orig. tit. Custodes. Nor will it answer the purpose to attempt including guardianships in the idea of trusts, which are the present objects of equitable jurisdiction, as it must be seen that such attempt is an overstrained refinement; for though guardianship in the common acceptation of the word trust, may be properly so denominated, yet it as surely is not so in the technical sense in which lawyers use the word; and Chancery exercises a jurisdiction over trusts: For, in this latter, trusts are invariably applied to property, especially real estates, and not to the person. It must not, however, be understood, that this learned annotator, by the above remarks, intends to controvert the present legality of the jurisdiction thus exercised in Chancery over infants, his intent being merely to shew that such jurisdiction is not, as far as yet appears, of ancient date; and that, though it be now unquestionable, yet at first it seems to have been an usurpation, for which the best excuse was, that the case was not otherwise sufficiently provided for. Mr. Hargrave further observes, that "his conjectures as to the late commencement of this branch of jurisdiction in Chancery, is strengthened by some precedents, according to which, the first instance to be found of a guardian appointed by the Chancellor, on petition without bill was in 1696, in the case of Hampden. But, since that time, the court of Chancery hath exercised the power

(1) See 1 Bla. Com. 436.

marry (1); yet, by the temporal law, she cannot dispose of her fortune, and there-

of appointing guardians, without its being once called into question. Therefore, in the case of *Lady Teynham* v. *Lennard*, which was heard on an appeal to the Lords in 1724, the counsel for the respondent very properly stated, that the Lord Chancellor was intrusted with that part of the crown's prerogative which concerned the guardianship of infants. 2 Bro. P. C. 539. Under the same idea, too, the last marriage act refers to the Chancellor for the appointment of a guardian to consent to marriage, where the infant is without a guardian, and the mother is not living. 26 G. II. c. 33. § 11." The doubt intimated by the learned annotator, as to the rightful origin of this point of jurisdiction exercised in our court of Chancery, must necessarily, with reference to his professional claims, have materially influenced the judgment and opinions of his readers; and it appearing to me to be of some consequence to rescue a branch of jurisdiction so salutary in its exercise, from the imputation of having originated in usurpation, I cannot refrain from submitting the observations which have occurred to me upon it. It is observable that Mr. H. rather relies on the insufficiency of the arguments adduced in support of the jurisdiction, than on any positive fact or reasoning against it. And in so considering the subject, he has certainly a considerable advantage over his opponents. By some who maintain the jurisdiction of the court in this particular, it is said, that upon the abolition of the court of wards, the care which the crown was bound to take as guardian of its infant tenants, was totally extinguished in every feudal point of view, but resulted to the king in his court of Chancery, together with the protection of all other

fore the court will make such a disposition of the fortune of the ward, as may be most

infants in the kingdom. 3 Bla. Com. 426, 427. From this it might be inferred, that the jurisdiction of the court of wards and liveries was protective of infants in general; whereas the statute of H. VIII. by which the court of wards was erected, expressly confines the jurisdiction of that court to wards of the crown; and it is scarcely necessary to remark, that when a new court is erected, it can have no other jurisdiction than that which is expressly conferred; for a new court cannot prescribe. 4 Inst. 200. But if the statute 32 H. VIII. does not confer a general jurisdiction in the case of infants, but merely a particular jurisdiction as to wards of the court, it should seem to follow that the general superintendence of the crown over infants, as pater patriæ, if it existed at common law, was not affected by the statute, except in those cases to which it expressly refers. What those cases were, are particularly enumerated by the statute, and also in the instructions to the court of wards and liveries, prefixed to Ley's Reports. See also Reeve's His. Eng. Law, 4 v. 259. That in every civilized state, such a superintendence and protective power does somewhere exist, will scarcely be controverted. That if not found to exist elsewhere, it may be presumed to vest in the crown, will not, I think, be denied. Assuming, therefore, that the general superintendence of infants did originally vest in the crown, I shall conclude, that eâ ratione, it is now exercised in the court of Chancery as a branch of its general jurisdiction. But it has been asked, Why, if no particular warrant be necessary to the court in the care of infants, is a separate commission under the sign manual necessary to authorize the

beneficial for her. But if she was of full age at the time of her marriage, then she

Chancellor's jurisdiction in the case of idiots and lunatics, which are also referred to the head of general protection? The answer is, that the custody of the persons and lands of idiots and lunatics, at least of such as held lands, was not anciently in the crown, but in the lord of the fee. The 17 Ed. II. c. 9, (or, as lord Coke and others suppose, an earlier statute, see 2 Inst. 14) gave to the king the custody of idiots, and also vested in him the profits of the idiot's lands during his life; by which the crown acquired a beneficial interest in the lands; and as a special warrant from the crown is in all cases necessary to the grant of its interest, the separate commission which gives the Chancellor jurisdiction over the persons and estates of idiots, may be referred to such consideration. And, with respect to the care of lunatics, the statute of 17 Ed. II. c. 10, enacts, that the king shall provide that their lands and tenements shall be kept without waste. The statute confers merely a power, which cannot be considered as included within that general jurisdiction conferred long before by the great seal; and, therefore, for the delegation of this new power, a separate and special commission was necessary. But see the case of *Oxendon* v. *Ld. Compton*, 2 Ves. jun. 71, in which Lord Loughborough, C. is reported to have stated, that the statute 17 Ed. II. c. 10. is not introductive of any new right in the crown. Others, who have attempted to support the general jurisdiction of the court of Chancery upon this point, have resorted to the circumstance of writs of ravishment of ward, and de recto de custodia issuing out of Chancery; and others have attempted to support it upon the notion of a guardianship being a trust. Mr. Hargrave

was out of the care of the court; and the court cannot at all interpose; though she

has, in my opinion, given a sufficient answer to the first class of cases, namely, of the writs of ravishment of ward, &c. by observing, that those writs are returnable in courts of common law; and, with respect to the idea of a guardianship being a trust, though I think it founded so far at least, as to entitle any court of equity to call upon the guardian to account, it does not, in my opinion, touch the point which respects the right of a general and exclusive superintendence over the interests of infants in the court of Chancery. If such a power be a mere trust, every court of equity has a concurrent jurisdiction upon the subject; but quære, if the court of Exchequer, as a court of equity, has such concurrent jurisdiction? It may indeed appoint a guardian ad litem to manage the defence of the infant, if a suit be commenced against him; a power which is incident to every court of justice. It may also, when the interest of an infant comes before it judicially, provide for its security and protection; but whether it can appoint a guardian to an infant for general purposes, where none is appointed; or whether it can, in an equal extent, exercise that protective power which watches over the interest of infants in the court of Chancery, is a point which I do not find any where solemnly determined, and which, with reference to the fiction upon which the equitable jurisdiction of the court of Exchequer is founded, I should think at least doubtful. That the general jurisdiction exercised by our Court of Chancery, in the cases of infants, flows from its general authority, is further evinced by the concurrent jurisdiction exercised by the Master of the Rolls, and by the appellate jurisdiction of the House of Lords, nei-

be under age, as some say, unless where the husband is plaintiff here in Chancery,

ther of which have any jurisdiction in the case of idiots and lunatics. Upon the whole, I submit, that the general superintendence and protective jurisdiction of the court, in the case of infants, is a delegation of the duty of the crown; that its general jurisdiction was not even suspended by the statutes of H. VIII. erecting the court of wards and liveries. That the case of idiots and lunatics is distinguishable; the jurisdiction exercised in Chancery, as to the first, being the grant of an interest, and, in the latter, the delegation of a power conferred by parliament. *Demanneville* v. *Demanneville*, 10 Ves. 52. With respect to the extent of the jurisdiction of the court of Chancery, as protective of the persons and interests of infants, it may be material to observe, that the court may interpose even against that authority and discretion which the father has in general in the education and management of his child. *Duke of Beaufort* v. *Bertie*, 1 P. Wms. 702. *Butler* v. *Freeman*, Ambl. 302. *Lord Shaftesbury*'s case, 2 P. Wms. 117. *Potts* v. *Norton*, 24th April 1792, cited in *Lord Shaftesbury*'s case. *Cruse* v. *Orby Hunter*, MSS. Sittings after T. 1790. *Powel* v. *Cleaver*, 2 Bro. Ch. Rep. 499. *Wilcox* v. *Drake*, Dick. 631. But, quære, if such child must not be a ward of the court? *ex parte Warner*, 4 Bro. Ch. Rep. 101, 102. A multo fortiori, it may interpose against persons who derived their whole authority from the father; see *Tombes* v. *Elers*, Dick. 88. Therefore, though the court cannot remove a testamentary guardian appointed according to the statute, or consider his misconduct a contempt, unless the infant be a ward of the court, *Goodall* v. *Harris*, 2 P. Wms. 561, yet it may impose such restrictions as will prevent

to have the trustees to transfer their estate, or for any other favour of the court; then, indeed when they had such a hand upon him, they may make him do such things as shall be reasonable (c), otherwise there is no

him from prejudicing the interests of his ward. *Foster* v. *Denny*, 2 Ch. Ca. 237. *Roach* v. *Garvan*, 1 Ves. 160. As to guardians at common law, it seems admitted, that they may be removed, or be compelled to give security, if there appear any danger of their abusing either the infant's person or estate. *Foster* v. *Denny*, 2 Ch. Ca. 237.

(*b*) If therefore a man marry a ward of the court, without the consent of the court, he shall be committed for such contempt, though it appear that he knew not that she was a ward of the court; *Herbert*'s case, 3 P. Wms. 116. *Butler* v. *Freeman*, Ambl. 303. *Chassaing* v. *Parsonage*, 5 Ves. 15.; and there must be a proper settlement made on the wife before such contempt can be cleared. *Stevens* v. *Savage*, 1 Ves. jun. 154. And the contempt is not cleared by the ward's attaining her age, though she should be ready to waive her claim to a settlement; see *Stackpoole* v. *Beaumont*, 3 Ves. 89. *Wade* v. *Scruton*, T. T. 1818. *Winch* v. *James*, 4 Ves. 386. See *ex parte Ashton*, Dick. Rep. 23. in which the court interposed, on the ground that the party was an idiot.

(*c*) This equity is not peculiar to infant wards of the court; it extends to all cases in which the husband seeks, through the medium of the court, to make his legal right to his wife's property available; see B. I.

(2) *Micoe* v. *Powell*, 1 Vern. 39.

colour in it (2). 2dly, This court, upon application made to it by guardians, has settled the maintenance of infants (*d*). And

c. 2. s. 6. B. I. c. 4. s. 24. Neither is this branch of jurisdiction peculiar to the court of Chancery, it equally extends to the court of Exchequer. It seems also that as the husband might defeat or prejudice the equity of the wife by assignment of her property, though in court, the wife may by her next friend institute a suit to restrain such assignment. See *Ellis* v. *Ellis*, Ch. July 1793. MSS.

(*d*) It was once conceived that a bill was necessary for the purpose of such an order, but it is now settled that it may be done by petition; see *ex parte Kent*, 3 Bro. C. R. 88, and *ex parte Salter*, 3 Bro. C. R. 500, where the cases are brought together, upon the authority of which the practice now proceeds. And as the court will allot maintenance for the infant out of the produce of his estate, it will also, in so doing, consider the circumstances and state of the family; as where there is an elder son an infant, and younger children who have no provision, the court will allow a more ample maintenance to the guardian of the eldest son, by which the younger children may be maintained. *Hervey* v. *Hervey*, 2 P. Wms. 21. *Sandys* v. *Duke of Athol*, 2 Atk. 447. *Petre* v. *Petre*, 3 Atk. 511. *Roach* v. *Garvan*, 1 Ves. 160. *Style* v. *Style*, July 1799. MSS. *Burnett* v. *Burnett*, 1 Bro. C. R. 179. And as the court will, where the legacy is vested. (See *Descrambes* v. *Tomkins*, 1 Cox's R. 133.) order maintenance where none is directed by the will, and that though the interest is directed to accumulate, *Mole* v. *Mole*, Dick, 310. *Stretch* v. *Watkins*, 1 Mad. Rep. 253. So in other cases

a court of equity may, by the approbation of an infant's relations, allot the infant maintenance out of a trust estate, though there be no provision in the trust for that purpose; and this is founded on natural equity (3). But chancery never allows the principal to be lessened in maintenance of an infant (*e*). 3dly, If a man intrudes upon an infant, he shall receive the profits but as guardian, and the infant shall have an account against him in Chancery as guardian (*f*). For in the consideration of this

(3) *Englefield* v. *Englefield*, 2 Vern. 236. *Ld. Roseberry* v. *Taylor*, 26 Jan. 1702. 16 Vin. Ab. 442, 443.

it will refuse to apply the fund for maintenance, though so directed, if the father be living and of sufficient ability to maintain his child, *Hughes* v. *Hughes*, 1 Bro. Ch. Rep. 387. That the court will in some cases allow the principal to be broken in upon, see *Barlow* v. *Grant*, 1 Vern. 255. *Harvey* v. *Harvey*, 2 P. Wms. 22.

(*e*) See, contra, *Barlow* v. *Grant*, 1 Vern. 255, where the legacy is of small amount.

(*f*) Though it is one of the peculiar duties of a court of equity to protect the rights of infants, it must not, as has been already observed, thence be inferred, that they will at any period, or under any circumstances, act upon such indulgent disposition; for if an infant neglect to enter within six years after he comes of age, he is as much bound by the statute of limitations from bringing a bill for an account of mesne profits, as he is from an action of account at common law. *Lockey* v. *Lockey*, Pre. Ch. 518. See 1 vol. 159, note (*m*). See *Griffin* v. *Griffin*, 1 Sch. & Lef. 352.

court, he shall be looked upon as trustee for the infant(4). And if a man, during a person's infancy, receives the profits of an infant's estate, and continues to do so for several years after the infant comes of age, before any entry is made on him; yet he shall account for the profits throughout, and not during the infancy only. And so it seems at law, he should be charged in an action of account, as tutor alienus.

(4) *Newberg v. Bickerstaffe*, 1 Vern. 295. *Morgan v. Morgan*, 1 Atk. 489.

SECTION II.

GUARDIANS are appointed (g) by writ for infants, and one or more guardians jointly (1), and the court of Chancery may assign one of the six clerks to be guardian to an infant (2). But a guardian cannot be otherwise appointed, than by bringing

(1) *Bertie v. Ld. Falkland*, 3 Ch. Ca. 136.

(2) *Anon.* 2 Ch. Ca. 164. *Offley v. Jenny*, Nels. Rep. Ch. 44.

(g) Guardians are appointed in Chancery where such appointment is necessary to the purpose of protecting the infant's general interest, or for the purpose of sustaining a suit, or for the purpose of consenting to the marriage of the infant. *Ex parte Woolscombe*, 1 Mad. R. 213.

the infant into court, or his praying a commission to have a guardian assigned him(3). Where there is a guardianship by the common law, this court will intermeddle and order; but if there be a guardian by act of parliament (*h*), it cannot remove him or

(3) *Lloyd* v. *Carew*, 1 Eq. Ca. Ab. 260. pl. 2.

(*h*) By the law of England there are three manner of guardianships, viz. by the common law, by statute law, and by custom. By the common law there are four manner of guardians, viz. guardian in chivalry, guardian by soccage, guardian by nature, guardian by reason of nurture. Co. Litt. 88, b. *Ratcliffe*'s case, 3 Rep. 37, b. Though guardianship in chivalry is now taken away by the 12th Ch. II. c. 24. yet as the knowledge of some general points concerning it cannot but be useful, I must beg to refer to Mr. Hargrave's note, Co. Litt. 93. note (11), in which the leading points upon it are brought together. See also 3 Com. Dig. title Guardian. With respect to guardianship by nature, the subject appears to be involved in considerable obscurity, principally occasioned by the various and indefinite manner in which the right to such species of guardianship, and the infants who are objects of it, have been considered. As to the right to guardianship by nature, Chief Baron Comyns states, that guardianship by nature extends only to the father, and denies the right of the grandfather to the wardship of the heir apparent, and refers to *George*'s case, 6 Rep. 22; but upon this point Mr. Hargrave observes, that "it seems that not only the father but also the mother, and every other ancestor, may be guardians by nature, though with considerable differences, such as denote the superiority of the father's claim. The father hath the prior title to guardianship

her (4). Yet in this, and all other like cases, they shall give security not to marry

(4) *Foster* v. *Denny*, 2 Ch. Ca. 237. *Roach* v. *Garven*, 1 Ves. 158. *Leeone* v. *Sheirs*, 1 Vern. 442.

by nature; the mother the second; and as to other ancestors, if the infant happen to be heir apparent to two, as to both a paternal and maternal grandfather, perhaps in this equality of rights, priority of possession of the infant's person may decide the preference, according to the general rule in æquali jure melior est conditio possidentis. But this difference merely respects the order of succession to guardianship by nature. But whilst the tenure by knights-service continued, there was another difference which more strongly marked the superiority of this guardianship when claimed by the father, for he was entitled to the custody of the infant's person even against the lord in chivalry. But the mother and other ancestors were not allowed to have the same preference. It is by this last diversity that Lord Coke in *Radcliffe*'s case, 3 Rep. 38, b. reconciles the books, which appear to exclude the mother and all other ancestors except the father, from guardianship by nature; it being observed by him, that they only apply to those cases, in which the right to the infant's person was in contest with the lord in chivalry." Co. Litt. 105, Hargrave's note (12).

With respect to what infants are objects of this species of guardianship, we find in some cases that the father and mother are denominated the natural guardians of all their children; *Roach* v. *Garvan*, 1 Ves. 158; *Mellish* v. *De Costa*, 2 Atk. 15; *Smith* v. *Marshall*, 2 Atk. 70; *Webber* v. *Brick*, M. T. 1800, and in some cases, even the parents of illegitimate children are so considered; *Ord* v. *Blackett*, 9 Mod. 117; and in other cases, the guardianship of female children under sixteen,

the child, infra annos nubiles, or consent or be aiding to the marriage of such child,

as given to the father and mother by the statute of P. and M. is said to be *jure naturæ*. *Radcliffe*'s case, 3 Rep. 39, a. Upon which *dicta*, Mr. Hargrave observes, "according to the strict language of our law, only an heir apparent can be subject of guardianship by nature; which restriction is so true that it hath even been doubted whether such a guardianship can be of a daughter; (see *Thorp*'s case, Holt's Rep. 333. Carth. 384) whose heirship though denominated apparent, yet being liable to be superseded by the birth of a son, is in effect rather of the presumptive kind. *Radcliffe*'s case, 3 Rep. 38, b. Therefore, when guardianship by nature is extended to children in general, or to any but such as are heirs apparent, it is not conformable to the legal sense of the terms amongst us, but must be understood to have reference to some rule independent of the common law. Thus when in Chancery the father and mother are styled the natural guardians of *all* their children born in marriage, or of any of their illegitimate issue, we should suppose those who express themselves so generally to refer to that sort of guardianship, which the order and course of nature, so far as we are able to collect it by the light of reason, seems to point out, and to mean that it is a good rule to regulate the guardianship by, where positive law is silent; and it is in the discretion of the Lord Chancellor to settle the guardianship. So, too, when Lord Coke says the custody of a female child under sixteen, to which the father, and after his death, the mother, is entitled, by the provisions of the st. 4 and 5 P. and M. is jure naturæ, we should understand him to mean, not that such a custody was a guardianship by nature, recognized by our common law,

post annos nubiles, during minority, without acquainting this court therewith (5).

(5) *Foster* v. *Denny*, 2 Ch. Ca. 237. *Lord Raymond*'s case, Forrest 58. *Smith* v. *Smith*, 2 Atk. 304. and see *Eyre* v. *Countess of Shaftsbury*, 2 P. Wms. 112.

but merely that it was a statutary guardianship, adopted by the legislature, in conformity to the dictates of nature, and upon principles of general reasoning. But though what our law calls guardianship by nature, is thus confined to the heir apparent, yet we must not thence conclude that parents have not a right to the custody of their other children, for our law gives the custody of them to their parents till the age of fourteen by the guardianship of nurture; Co. Litt. 106, a. Mr. Hargrave having explained who are entitled to the guardianship by nature, and what infants are the objects of it, concludes with an enumeration of the following particulars concerning it. 1st, This guardianship continues till the infant attains the age of twenty-one. 2d, It extends no further than the custody of the infant's person. 3dly, It yields as to the custody of the person to guardianship in soccage, where the title to both guardianships concur in the same individual, as they necessarily do in the case of father or mother, if lands, held by a soccage tenure, descend on the heir apparent, being an infant, and may in the case of other ancestors. But guardianship in soccage, ending at fourteen, he presumes, that after that age, the father or other ancestor, having a like title to both guardianships, becomes guardian by nature till the infant's age of twenty-one; see Carth. 384. And lastly, the father may disappoint the mother and other ancestors of the guardianship by nature, by appointing a testamentary guardian under the statutes of Philip and Mary, and Charles the Second."

But the Chancery cannot restrain the infant from marriage ad annos nubiles. But

" Guardianship by socage, like the one in chivalry, springs wholly out of tenure: therefore the title to it cannot arise, unless the infant is seised of lands or other hereditaments, lying in tenure, holden by socage. Like guardianship in chivalry, it is deemed to take place on a descent only, though some have argued to the contrary: see *Quadring* v. *Downs*, 2 Mod. 176; where the point is decided; see also Vin. Ab. tit. Guardian (1). The title to this guardianship is in such of the infant's next of blood as cannot have by descent the socage estate; in respect of which the guardianship arises by descent, without any distinction between the whole and half blood. If there are two or more in equal degree, he who first gains possession of the heir shall have the custody of him; except where they happen to be brothers or sisters, or to be the infant's lineal ancestor, the law preferring the eldest in the former case, and the father or other male ancestor in the latter. But if the infant derives lands by descent, both ex parte paternâ and ex parte maternâ, in which case it may be possible not to find any next of kin incapable of inheriting to the infant; the next of kin of either side, first seizing the infant is entitled to the custody of his person, and the custody of the lands coming ex parte paternâ, goes to the maternal heir; and so vice versa, as to the lands coming ex parte maternâ. Should, however, the infant derive lands by descent, in such a way as lets in both the paternal and maternal blood successively to the inheritance, but with a preference of the former; as where the infant derives lands by descent to a brother, who was the first purchaser, and there is no next of kin but such as may inherit from the infant,

if a person appointed guardian, pursuant to the statute, (viz. 12 Car. II. cap. 24.)

it seems unsettled who should have the guardianship. If the person entitled to be guardian in socage, is himself under the custody of a guardian, the latter is entitled to the custody of both: to the former in his own right, and the latter, per cause de ward, that is, in right of his wardship of the former. But as it is wholly for the infant's benefit, and not in any respect for the guardian's profit, it is not a subject either of alienation, forfeiture, or succession, as wardship in chivalry was; and consequently if the guardian in socage becomes incapable, or dies, the wardship devolves upon the person next in degree of kindred to the infant, not being inheritable to him. Fitzherbert, indeed, in his Natura Brevium, cites two cases of Edward the Third, in which guardian in socage granted the wardship to a stranger, and the grant was held to be good; F. N. B. 143. The same author too, in his Abridgement, gives another case of the same reign, according to which a lease of guardianship in socage was pleaded; Fitzh. Abr. Gade, 161. But possibly these cases import only, that a guardian in socage may place the body of the infant under the custody of another, and that such placing will be a good answer to an action for ravishment of the ward, not that the guardianship itself may be transferred by bargain and sale. However, should these ancient authorities not bear the former construction, they seem sufficiently answered by the doctrine and practice of later times, for in them, the acknowledged qualities of guardianship in socage being, that it is a personal trust wholly for the infant's benefit, and neither transmissible by succession, nor deviseable, are not consistent with its being assignable; and we have

dies or refuses to take upon himself the guardianship (6), the lord chancellor may

(6) *Lloyd* v. *Carew*, 1 Eq. Ca. Ab. 260. pl. 2, *Darcey* v. *Ld. Holderness*, 1 P. Wms. 703, note.

Lord Chief Justice Vaughan's authority for saying, that, even in his time, common experience proved the contrary; see Plow. 293. Vaug. 181. It extends not only to the person and socage estates of the infant, but also, to his hereditament not lying in tenure, and even to his copyhold estates, unless there is a special custom for the lord's appointing a guardian of them; *Egleton*'s case, 1 Ro. Abr. 40; see also Hutt. 17; and 2 Lutw. 1181. But whether the guardian in socage is entitled to take into his custody the infant's personal estate, we have not yet been able to ascertain by any express authority. However, we are inclined to think that personalty is included, except where by the custom of a particular place it happens to be liable to a different custody; our idea being, that the custody of the infant's person draws after it the custody of every species of property, for which the law hath not otherwise provided. This idea receives some countenance from the instances of copyholds and hereditaments not lying in tenure; for including which, it will be difficult to account by any other reason than the one we give for including personalty; it is also strongly confirmed by the manner in which the 12 of Ch. II. c. 24, regulates the powers of the guardian which it enables a father to appoint. And authorizing such guardian to take the custody of the infant's personal estate, as well as of his lands, tenements, and hereditaments; it provides, that he may bring such action or actions in relation thereto, as by law a guardian in common soccage might do; words almost necessarily importing that the personal estate is equally an object of the custody of the guar-

appoint a guardian (*i*). As to the custody of lunatics, it is no question of right, but

dian in socage with the infant's real property. Yet we must apprize the reader, that there is an expression of Lord Chief Justice Vaughan, in his Reports, which conveys, or seems to convey, a different opinion; for, speaking of guardian under the statute of Charles the Second, he says, " this new guardian hath the custody, not only of the lands descended or left by the father, but of lands and goods any way required or purchased by the infant, which the guardian in socage had not; Vaugh. 186. It is superseded both as to the body and lands, if the father exercises his power of appointing a testamentary or other guardian, according to the statute of 12 Cha. II. c. 24. Regularly it ends, when the infant, whether male or female, attains fourteen; though some say, that this must be understood only where another guardian, either by election of the infant, or otherwise, is ready to succeed, and that the guardianship in socage continues in the mean time; And. 313." Hargrave's note (13).

" As to guardianship by nurture, it only occurs where the infant is without any other guardian; and none can have it except the father or mother. 8 E. IV. 7, b. Br. Guard. 70. 3 Co. 38. It extends no farther than the custody and government of the infant's person, and determines at fourteen, in the case both of males and females. Lord Chief Baron Comyns indeed refers to Fleta, as if, according to that ancient book, grandfathers and great-grandfathers might be guardians by nurture; 3 Com. Dig. 421; but the passage cited doth not point at this species of guardian, it describing the patria potestas in general, and being apparently bor-

of prudence, and where no right there is no wrong. It shall never in this, or in any

rowed from the text of the Roman law; nor will it bear the least application to guardianship, as our own law regulates it." Hargrave's note (13), Co. Litt. 119, b.

By construction of the statute 4 and 5 P. and M. c. 8, the father might, by deed or will, assign a guardian to any woman child under the age of sixteen. But, by the 12 Car. II. c. 24, which, considering the imbecility of judgment in children of the age of fourteen, and the abolition of guardianships in chivalry, which lasted till the age of twenty-one, it is enacted, that where any person shall have any child or children under the age of twenty-one years and not married at the time of his death, it shall be lawful for the father of such child or children, whether born or in ventre sa mere, or whether such father be within the age of twenty-one years, or of full age, by deed executed in his life-time, or by his last will, in the presence of two or more credible witnesses, in such manner, and from time to time, as he shall respectively think fit, to dispose of the custody of such child for and during such time as such child shall continue under the age of twenty-one years, or any less time, to any person or persons in possession or remainder, other than popish recusants, as the father shall appoint. Guardians so appointed, are called testamentary guardians, or guardians by statute.

The above clauses may be considered under the following heads:

1st, Who may appoint a testamentary guardian.

other case, be committed to any that will make gain of it, or who is concerned to out-

2dly, To what child a testamentary guardian may be appointed.

3dly, Who may be appointed.

4thly, How such appointment may be made.

5thly, When such appointment determines; and,

6thly, The effect of such appointment.

1st, As the father only is authorized to appoint a testamentary guardian to his child, an appointment by the mother is absolutely void. *Bedell* v. *Constable*, Vaugh. 180. *Ex parte Edwards*, 3 Atk. 519. So also is an appointment by the guardian appointed by the father, for it is a personal trust, and not assignable; *Bedell* v. *Constable*, Vaugh. 179; *Mellish* v. *Da Costa*, 2 Atk. 15. It has also been held that a copyholder is not within the statute, the custody of the infant belonging to the lord. *Clench* v. *Cudmore*, 3 Lev. 395.

2dly, The father's power of appointment extends to all his legitimate children under twenty-one, and unmarried at his decease, or born after. I have confined it to legitimate children; for, though a natural daughter is considered to be within the statute of P. and M. *Rex* v. *Corneforth*, Stra. 1162, natural children are not within the statute of Ch. II. But though not within the statute, the court will, unless some objection be shewn, adopt the nomination of the father; *Ward* v. *St. Paul*, 2 Bro. C. R. 583; and *Peckham* v. *Peckham*, there stated in a note. So if the appointment be not conformable to the statute. *May* v. *May*, Dick. 527. As to marriage by a natural child, without the consent of a guardian appointed by the Court of Chancery, see

live the lunatic, as being nearest of blood, and entitled to the administration; and the

Priestley v. *Hughes*, 11 East 1, in which the marriage of a natural child, without such consent, was held void; a decision which appears to me, with reference to the general error that has prevailed upon the point, to call most strongly for the interference of the legislature. As to appointment of a guardian to a legitimate child to consent to marriage, see, in matter of *Martha Woolscombe*, 1 Mad. 213.

3dly, Though popish recusants are the only persons named in this act, there are other persons disabled by other statutes. See 9 and 10 W. c. 32. and the statutes relative to the qualifications for officers. See also Swin. part 3. s. 10.

4th, Though the father may dispose of the custody of his infant child by deed or will, yet if he dispose of it by deed, such disposition may be revoked by will; *Lord Shaftsbury* v. *Hannam*, Finch's Rep. 323. But if there be a covenant in the deed that the father will not revoke it, equity will not set it aside, unless the condition be complied with, or the trust abused; *Lecone* v. *Sheires*, 1 Vern. 442. It has also been held, that a will merely appointing a testamentary guardian, need not be proved in the spiritual court; for as it is an appointment which takes effect solely by act of parliament, the temporal court should be judges thereof. *Lady Chester*'s Case, 1 Ventr. 207. And as the statute prescribes no particular form of disposition or appointment, it is immaterial by what words the guardian is appointed, provided the father's intent be sufficiently apparent. Swimb. p. 3. c. 12.

allowance must be liberal and honourable (7).

(7) See b. 1. c. 2. f. 2. note (2).

5th, That as the statute declares such guardianship shall continue till twenty-one, if so prescribed by the father, it shall not be determined even by the marriage of the infant; *Mendez* v. *Mendez*, 3 Atk. 625. If a man devise the custody of his heir apparent, and no time is mentioned, yet it is a good devise of the custody within the act, if the heir be under fourteen at the death of the father; because, by the devise, the guardianship is changed only as to the persons, and left the same as to the heir. But if the heir be above fourteen, then the devise is void for the uncertainty; for the act did not intend that every heir should be in custody until twenty-one, but only so long as the father shall appoint, not exceeding that time; *Bedell* v. *Constable*, Vaugh. 184.

6th, That as the father, though under age, may grant the custody of his heir, the land will follow as an incident given by law to attend it, though the father, being under age, could not have devised or demised his land in trust for him directly; *Bedell* v. *Constable*, Vaugh. 178.

The statute 12 Car. II. c. 24. § 8, 9, further provides, that the appointment of such testamentary guardians shall be effectual against all claiming as guardians in socage, or otherwise; and that the guardian so appointed shall have ravishment of ward or trespass, and recover damages as for the ward's benefit; and that such guardian shall have the custody of the infant's estate, both real and personal, and have the same actions in relation to them as guardian in socage. But though a testamentary guardian shall have custody of the infant's real estate, a lease granted by him of the

infant's real estate is absolutely void; *Roe*, on dem. of *Parry*, v. *Hodgson*, 2 Wils. 129. 135. And though testamentary guardians are not so immediately subject to the direction of the court of Chancery, yet they are within its preventive and controlling jurisdiction. If, therefore, the court has reason to apprehend that a testamentary guardian meditates an injury to his ward, it will interpose, and if possible prevent the mischief; *Duke of Beaufort* v. *Bertie*, 1 P. Wms. 704, 705; but see *Morgan* v. *Dillon*, 9 Mod. 135, which decree was reversed by the House of Lords; 3 Bro. P. C. 341. But whatever doubt may exist as to the jurisdiction of the court of Chancery to remove a testamentary guardian, merely for the purpose of preventing mischief to the ward, there can be no doubt but that the court may control a guardian who has actually misconducted himself. See *Anon.* 1 Sid. 424. See also the case of *Lord Noel* v. *Somerset*, referred to in *Roach* v. *Garvan*, 1 Ves. 160. That a testamentary guardian may be removed, if he become a lunatic, see *ex parte Lady Ann Brydges*, H. T. 1791; so if he become a bankrupt, *Smith* v. *Bate*, Dick. 631. That the power of a father to appoint a testamentary guardian to female children, under 4 and 5 Ph. & M. c. 8, does extend to natural children, see *Rex* v. *Corneforth*, Stra. 1162; and that natural children are not within the statute of Charles II. see *Ward* v. *St. Paul*, 2 Bro. Ch. R. 583. But though natural children are not within the act of Ch. II. the court will adopt the nomination of the reputed father, without referring it to a master, unless some objection be stated to the person named by the father; *Ward* v. *St. Paul*, 2 Bro. Ch. Rep. 583; and *Peckham* v. *Peckham*, there cited in a note.

(*i*) And a guardian so appointed is competent to consent to the marriage of an infant. *Ex parte Birchell*,

3 Atk. 813. But a petition, that a guardian may be assigned, unless to carry on a suit, or protect an interest, must be pursuant to the statute. *Ex parte Becher*, 1 Bro. Ch. Rep. 556.

SECTION III.

A TUTOR or guardian was looked upon in the civil (1) law to be in the place of a father to the minor, who, by reason of the infirmity of his age, was deemed unable to take care of himself; and the particulars of his charge was, first, of his person and education, and to lay out all reasonable expences for him, in proportion to the value of his estate, since it was not his estate alone, but his morals that he was appointed to look after. But, in the second place, he was to take care of his patrimony, and to be as provident of his affairs, as a prudent master of a family is of his own; and the power of the tutor was limited to what might be profitable to the minor, for so far they thought his authority established by justice itself. And so it seems formerly in the law of England (2), he that was constituted tutor or guardian ought to see that

(1) Dig. lib. 26. tit. 7. 27. 30 Cod. lib. 5. tit. 59. Vinnius, in Inst. lib. 1. tit. 21.

(2) Cowel's Inst. lib. 1. tit. 21. 24.

the heir be well brought up, and that his estate be safely kept; for he can do nothing but for the profit and benefit of the infant, nor intermeddle with any thing but of what he may render an account (*k*). And he was bound to put in security before his admission, and to make oath to administer the affairs of the minor to his profit and benefit; to exhibit a true and faithful inventory of all the goods, and to render an exact and true account of his office, whensoever it was required by the judge, which is the same oath that was administered to all executors and administrators. But this law is not now observed here, as it was in Rome, to the great detriment of many minors. But, both in Chancery and in the civil law, an infant might call his guardian to an account, even during his minority, if there fell out any thing that made it necessary.

(*k*) And therefore a guardian cannot present to a church. Co. Litt. 89, a. Cro. Jac. 99. *Hearle* v. *Greenbank*, 3 Atk. 710. *Arthington* v. *Coverley*, 2 Eq. Ca. Ab. 518. But, *quære*, whether the court will not control the presentation by the infant, if improperly obtained, without the concurrence of the guardian? See B. I. c. 2. s. 5.

BOOK THE THIRD.

Of Mortgages and Pledges.

CHAP. I.

Their Nature.

SECTION I.

It follows, in the next place, that we treat of mortgages and pledges. This kind of agreement was useless in a state of nature; because it was lawful for the creditor, in that state, to seize on any part of the debtor's goods or estate, without any special contract (1). For right reason, and the nature of society, prohibits not all force, but that which is repugnant to society: that is, which depriveth another of his right. For the end of society is, that, by mutual aid, every one may enjoy his own. And, as naturally every man may vindicate his own right, so, to profit another, in what he can

(1) Puff. b. 5. c. 10. § 16.

justly, is not only lawful, but also commendable. But civil society being ordained for the maintenance of tranquillity, there arises presently to the commonwealth a certain greater right over us, so far as is necessary to that end; and, therefore, so far as it may and will prohibit that promiscuous right of resisting. Nor were there any mortgages of lands with us, while the feudal tenures were on foot (*a*); because

(*a*) The feudal system being, in its principles, inconsistent with the tenant's right of mortgaging his lands, may be reasonably considered as having, during its prevalence in this country, at least suspended the general exercise of such right; but that mortgages were not known in England prior to the introduction of that system, can by no means be correctly inferred, from no trace of them being apparent subsequently to the introduction, and during the continuance of such system.

The nature of a mortgage presupposes the right of alienation, at least for a certain time; and indeed it seems difficult to conceive, that, in any country in which such right of alienation exists, the qualified or conditional exercise of it, by way of mortgage, or at least the vadium vivum, should be wholly unknown. The temporary wants of mankind, in a state of civilized society, would naturally suggest such a mode of providing for them; and, accordingly, we find the Jews, in the earliest period, availing themselves of this species of alienation, as far as their law would allow,

such conveyances were looked upon as a sort of fraud on the constitution. But when a licence of alienation was given about the time of H. III. and it became a maxim in law, that the purity of a fee-simple imported a power of disposing of it as the owner pleased, there were two ways of

namely, mortgaging their lands until the ensuing jubilee. For an account of this solemnity, see 2 vol. Ancient Universal History, p. 130, 131. From the Jews, the notion of mortgages is said to have been derived to the Greeks and Romans; and we are by some supposed to have borrowed it from the civil law; see 3 Ba. Ab. title Mortgage, and Powell on Mortgages. The origin of any usage is seldom of much concern, and, on the present subject, it appears to me to be wholly immaterial. I shall, therefore, merely remark, that though it was a rule in the feudal law, that fudalia invito domino aut agnetis non recte subjiciuntur hypothecæ; yet that it appears from Craig, that, with the concurrence of the lord, the tenant might alien, and consequently might mortgage his lands. Feud. lib. 2. tit. 5. § 5. As to our having borrowed the idea of a mortgage from the civil law, Mr. Butler observes, that it appears from Littleton, § 332, that they were introduced, less upon the model of the Roman pignus or hypotheca, than upon the common law doctrine of conditions: an observation which, however correct as to the mortgage itself, certainly does not apply to the equity of redemption, which, in courts of equity, is, prior to foreclosure, considered as an incident inseparable from it. Vide Vinnius in Inst, lib. 3. tit. 15.

pledging lands introduced, which Littleton (2) distinguishes by the names of *vadium vivum*, and *vadium mortuum*. The first is, where a man borrows a sum of money of another, and makes over an estate of lands to him, until he hath received the same out of the issues and profits; so that neither the money nor the land dies, or is lost. The other, where a feoffment is made upon condition, that if the feoffor pay to the feoffee such a sum by such a day, that then the feoffor may enter, &c. In this case, if he does not pay, then the land is taken from him for ever; and if he does, then the pledge is dead as to the tenant, &c.

(2) § 332. Co. Litt. 205.

SECTION II.

These sorts of conveyances, being usually made in fee-simple, were exposed to many inconveniences; for the estate being absolute at law, on default of payment was subject to the dower of the wife of the feoffee, and all other his real charges and incum-

brances; and, therefore, to prevent this (*b*), the ancient course in mortgages was to join another with the mortgagee in the conveyance (1). But the court of Chancery, though at first they made a scruple of breaking in upon the rules of law (*c*), have now

(1) *Nash* v. *Preston*, Cro. Car. 190, 191. Madox's Formulare, 569.

(*b*) With the same view, mortgages, for a long term of years, were, at a very early period, introduced; see Madox's Formulare, 230; which was attended with this advantage, that, on the death of the mortgagee, the term and the right in equity to receive the mortgage debt vest in the same person; whereas, in cases of mortgages in fee, the estate on the death of the mortgagee, goes to his heir or devisee, and the money is payable to his executor or administrator. This produces a separation of rights, that is often attended with great inconvenience, both to the mortgagor and the mortgagee. On the other hand, in case of mortgages for years, there is this defect, that if the estate is foreclosed, the mortgagee will be only entitled for his term. To guard against which, it has been thought advisable to make the mortgagor covenant, that, on non-payment of the money, he will not only confirm the term, but also convey the freehold and inheritance to the mortgagee, or as he shall appoint, discharged of all equity of redemption. Mr. Butler's note (1), Co. Litt. 206.

(*c*) Lord Hale observes, that in 14 Rich. II. the parliament would not admit of redemption. See the printed Rolls, vol. 3. p. 259. And though the right to redeem within a certain period is now incontrovertibly established, yet I have not been able to trace the period when such right was first allowed.

set this matter right; and since the lands were originally only a security for the money, therefore the payment of the money doth, in consideration of equity, put the feoffor in his first estate, as well after as before the condition broken.

SECTION III.

And although, with respect to the surplus of the estate over and above the mortgage-money, the mortgagee is usually looked upon in equity as a trustee for the mortgagor (*d*), yet there is a difference betwixt

(*d*) As to the nature of the estates of the mortgagor and mortgagee, it seems to be at length settled, that as the mortgagee is considered as holding the estate merely in the nature of a pledge, or security for payment of his money, a mortgage, though in fee, (the legal estate in which descends to the heir at law) is considered in equity only as personal estate.

Hence also a mortgagee, though in possession, will, in case of a living becoming vacant prior to foreclosure, be compelled in equity to present the nominee of the mortgagor; *Jory* v. *Cox*, Pre. Chan. 71; *Amhurst* v.

a trust and a power of redemption. For a trust is created by the contract of the party, and he may direct it as he pleases, and may provide for the execution of it, and therefore they only are bound by it who

Dawling, 2 Vern. 401; *Galley* v. *Selby*, Stra. 403; and that even though nothing but the advowson is mortgaged to him, and the deed contain a covenant, that, on any avoidance, the mortgagee should present; *Mackenzie* v. *Robinson*, 3 Atk. 559; for in such case, though the presentation is not deemed the subject of value, and therefore cannot be brought into the account, it might be a benefit beyond the securing of the principal debt, and lawful interest thereon; which decision over-rules that of *Gardiner* v. *Griffith*, 2 P. Wms. 403. In such case, however, it is said, that the mortgagee of the advowson might pray a sale: *Mackenzie* v. *Robinson*. But *quære*, if such sale could be decreed pending an avoidance? The mortgagee may, however, grant leases of the premises, and avoid such leases as have, since his mortgage, been granted by the mortgagor.

As to the estate of the mortgagor, though formerly doubted whether he had more than a right of redemption, it is now established, that he hath an actual estate in equity, which may be devised, granted, and entailed, and of which there is a possessio fratris, and a tenancy by the curtesy; *Casborne* v. *Scarfe*, 1 Atk. 603. But as to his possession of the mortgaged premises, he only holds them by the will or permission of the mortgagee, who hath been held entitled, by ejectment, and without notice to recover against him or his tenant; *Keeche* v. *Hall*, Doug. 21; *Moss* v. *Gallimore*, Doug. 279; but see *Da Costa* v. *Warton*, 8 Term. Rep. 2.

come in in privity of estate, or with notice, or without a consideration. As a tenant in dower is bound by it, because she is in the *per*; but not a tenancy by the curtesy, who is in the *post*. Nor shall any other, who comes in in the *post*, be liable to it, without express mention made by the party. But a power of redemption is an equitable right, inherent in the land, and binds all persons in the *post*, or otherwise; because it is an ancient right which the party is entitled to in equity. And although, by the escheat, the tenure is extinguished, that will be nothing to the purpose, because the party may be recompensed by the court for that, by a decree for rent, or part of the land itself, or some other satisfaction. And it is of such consideration in the eye of the law, that the law takes notice of an equity of redemption, and makes it assignable or devisable (1).

(1) *Paulett* v. *Attorney General*, Hard. 498. *Casburne* v. *Scarfe*, 1 Atk. 669.

SECTION IV.

AND equity is part of the law of England, so that it cannot in any manner of way be provided by agreement (1), in case of a mortgage, that the court of Chancery should not give relief (*e*). For such an agreement would be contrary to natural justice in the creation of it, and prove a general mischief; because every lender would by this method make himself chancellor in his own

(1) See *Spurgeon* v. *Collier*, 1 Eden's Rep. 60. where all the cases illustrative of this doctrine, and of the exceptions to it, are brought together.

(*e*) This rule is not confined to cases of redemption of mortgages, it being at least a general rule, that the jurisdiction of a court of equity cannot be ousted by the agreement of the parties; *Fry* v. *Porter*, 1 Ch. Ca. 141; *Wellington* v. *M'Intosh*, 2 Atk. 569. The authority of which last case, though shaken by the judgment in *Halfhide* v. *Fenning*, 2 Bro. Ch. Rep. 336, is restored by the judgment in *Mitchell* v. *Harris*, 2 Ves. jun. 129. There are, however, cases, the judgments upon which do not appear to be reconcileable with the above principle, that the jurisdiction of a court cannot be ousted by the agreement of the parties. I shall not however enter upon the discussion of those cases, but content myself with remarking, that, perhaps, the most effective security to the claims of justice is, to keep open the courts which are armed with the most extensive powers of administering it.

case, and prevent the judgment of this court (2). Neither shall a man have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement, since this would be to let in all manner of extortion and usury (3). But there is a difference between mortgages of Exchequer annuities and common stock, the value of which depends upon imagination, rather than a real value; for annuities are a certain security, and carry a constant interest, and therefore are to be considered as mortgages of lands, and cannot be sold after forfeiture without foreclosure (*f*). Yet annuities mortgaged are now held irredeemable after forfeiture, unless there be an express agreement that the mortgagee may sell after forfeiture (4).

(2) *Howard* v. *Harris*, 1 Vern. 191. *Newcombe* v. *Bonham*, 2 Ch. Ca. 61. *Talbot* v. *Bradill*, 1 Vern. 183. *Miller* v. *Lees*, 2 Atk. 494.

(3) *Jennings* v. *Ward*, 2 Vern. 520.

(4) *Manning* v. *Scott*, 14th Nov. 1714. 15th Vin. Ab. 476. marg.

(*f*) So held by Lord Harcourt in *Tucker* v. *Wilson*, 1 P. Wms. 261. But the decree was afterwards reversed by the House of Lords. See 1 Bro. P. C. 494. See also *Lockwood* v. *Ewer*, 2 Atk. 303. In which case Lord Hardwicke held, that it was not necessary to bring a bill of foreclosure on a mortgage of stock. But that there may be a foreclosure of such mortgage, see *Tancred* v. *Potts*, Rolls, June 20, 1749.

SECTION V.

And notwithstanding, that in a common mortgage, such covenants ought not to be regarded for the general inconvenience that would follow (*g*); yet this reasoning cannot extend where it is made with an intention to settle the estate, besides the consideration of the money paid. As where the conveyance is in consideration of 100*l.* paid to him by a person that married his kinswoman, upon condition, that if he did not repay the money with interest during his life, his heirs, &c. should then have no power to redeem; this court can neither shorten nor enlarge the time that is given by express covenant and agreement of the parties (1). So where there is a clause or provision to repurchase in a conveyance,

(1) *Bonham* v. *Newcomb*, 2 Vent. 364.

(*g*) The circumstances which brought this case out of the general rule, that an estate cannot be a mortgage at one time, and an absolute purchase at another, 1 Vern. 192, are very fully observed upon by Lord Keeper North, 1 Vern. 232, in his reversal of Lord Nottingham's decree; see also Sir *Nicholas Wolstan* v. *Aston*, Hard. 511.

the time limited ought precisely to be observed (2). But then this must be in case the court are fully satisfied that it was not originally a mortgage, but an absolute purchase *(h)*; or else a redemption may be decreed at any time within twenty years after the time of repurchasing is out.

(2) *Barrel* v. *Sabine*, 1 Vern. 268. *Endsworth* v. *Griffith*, 15 Vin. Ab. 468. c. 8.

(*h*) For if the parties appear to have intended a mortgage, the mortgagor shall be allowed to redeem, notwithstanding any condition that it should in any future event operate as a purchase; *Manlove* v. *Ball*, 2 Vern. 84; *Willett* v. *Winnell*, 1 Vern. 488; *Fulthorpe* v. *Forster*, 1 Vern. 476. *Copplestone* v. *Boxall*, 1 Ch. Ca. 1. *Clench* v. *Witherby*, Rep. Temp. Finch, 376; but see *Floyer* v. *Livington*, 1 P. Wms. 268; *Mellor* v. *Lees*, 2 Atk. 494; *Tasburgh* v. *Echlin*, 4 Bro. P. C. 142, and Powell on Mortgages, 31; a mortgage will not, however, be easily presumed against an absolute conveyance, especially if the possession has gone along with the conveyance, *Cottrell* v. *Purchase*, Forrest. 61; see *England* v. *Codrington*, 1 Eden's Rep. 169; *Spurgeon* v. *Collier*, 1 Eden's Rep. 55; but parol evidence is admissible, to shew or explain the real intention and purpose of the parties; though the conveyance be absolute; see *Sir G. Maxwell* v. *Lady Montacute*, Pre. Ch. 526; *Walker* v. *Walker*, 2 Atk. 98; *Joynes* v. *Statham*, 3 Atk. 388; *Vernon* v. *Bethell*, 2 Eden's R. 110.

SECTION VI.

And in equity there is no time limited for the redemption of a mortgage; and the common doctrine in the court of Chancery is, that mortgages were not within the statute of limitations, however that statute may be mentioned sometimes as a proper direction to go by (*i*); for the courts of equity are tender of settling any set time, because there can be no question in whom the property of the pawn is, when I possess it as another's, and proscription was introduced only to put an end to suits, and settle property which would otherwise be uncertain. Besides, a man can never be injured, if he receives principal, interest, and costs; but the proprietor of the land is injured, if he parts with his possession

(*i*) No rule appears to have prevailed in the civil law, restrictive of the time of redemption; as to the reasons upon which is founded the limitation of such right in our law, see Mr. Powell's Treatise on Mortgages, in which that point, and indeed the whole subject relative to mortgages, is considered with great exactness and discrimination; see also 1 vol. b. 1. c. 4. § 27. note (*s*).

under the true value (1). Yet where a man comes in at an old hand, the possessor shall account no farther than for the profits made in his own time (2), and upon extraordinary circumstances, it may be reasonable to debar him altogether of the power of redemption; and so this court sometimes hath allowed length of time to be pleaded (*k*) in bar, when the mortgaged estate hath descended as a fee, without entry or claim from the mortgagor, and where the possessor would be entangled in a long account (3).

(1) Eq. Ca. Ab. 313. note (a).

(2) *Pearson* v. *Pulley*, 1 Ch. Ca. 102. *Cloberry* v. *Symonds*, 1 Vern. 397.

(3) *Sanders* v. *Hord*, 1 Ch. Rep. 79. *Clapham* v. *Bowyer*, 1 Ch. Rep. 110. *Jenner* v. *Tracey*, *Belch* v. *Harvey*, 3 P. Wms. 288. note (b.) *Frazer* v. *Moor*, Bunb. 54.

(*k*) Though it seems agreed that length of time may be pleaded in bar of redemption, yet the authority of the cases in which the defendant has been allowed to take advantage of such circumstance by demurrer, is very much shaken; *Aggas* v. *Pickerall*, 3 Atk. 225. *Edsell* v. *Buchanan*, 2 Ves. jun. 83. *Hodle* v. *Healey*, 1 Ves. & B. 536.

SECTION VII.

AND it seems, now the court will not relieve mortgages after twenty years, (for the statute of 21 Jac. cap. 16. did adjudge it reasonable to limit the time of entry to that number of years,) unless there are such particular circumstances as may vary the ordinary case, as infants, feme coverts (*l*), &c. (which are provided for by the statute itself.) And although these matters in equity are to be governed by the course of the court, yet it is best to square the rules of equity as near the rules of reason and law as may be (1). So if there were infants: yet the time having begun upon the ancestor, it shall run even upon

(1) *White* v. *Ewer*, 2 Ventr. 340.

(*l*) With respect to persons labouring under any legal disability, it may be material to remark, that not only they, but their heirs, are not within the above rule as to redemption; *Carnell* v. *Sykes*, 1 Ch. Rep. 103. That the heir of the wife is bound to redeem, notwithstanding the tenancy by the curtesy of the husband, see *Anon.* 2 Atk. 333. *Corbell* v. *Barker*, Anstr. Rep. 138.

infants (*m*), as it is at law, in the case of a fine (2). But where a bill has been brought, and an account decreed within twenty years (*n*), a redemption may be decreed (3) upon the foot of that account. So if the mortgagor agreed the mortgagee should enter, and hold till he was satisfied (*o*); this

(2) *Knowles* v. *Spence*, 1 Eq. Ca. Ab. 315. *St. John* v. *Turner*, 2 Vern. 418. *Floyd* v. *Mansell*, Gilb. Rep. 185.

(3) *Proctor* v. *Cowper*, 2 Vern. 377.

(*m*) So also in the case of coverture or tenancy by the curtesy; see *Anon.* 2 Atk. 333.

(*n*) In the case of *St. John* v. *Turner*, 2 Vern. 418. which may appear irreconcileable with this rule, it is observable that the decree was not within twenty years.

(*o*) So if an account appear to have been made out between the mortgagor and mortgagee within twenty years; *Anon.* 2 Atk. 333. *Edsell* v. *Buchanan*, 2 Ves. jun. 83. *Lake* v. *Thomas*, 3 Ves. 20; or even if the mortgagor appear to have treated the estate as in mortgage; for the rule, proceeding on the notion of a dereliction of the pledge, and the difficulty of making up accounts after a great length of time, cannot apply to cases where the party in possession of the pledge continues to treat it as subject to redemption; *Ord* v. *Smith*, Sel. Ca. Ch. 9. *Palmer* v. *Jackson*, 5 Bro. P. C. 194. *Conway* v. *Shrimpton*, 2 Eq. Ca. Ab. 596. ca. 10. 1 Bro. P. C. 309. *Perry* v. *Marston*, 2 Bro. Ch. Rep. 397; *Quarrell* v. *Beckford*, 1 Maddock, 269. *Hodle* v. *Healey*, 1 Ves. & B. 536. *Vernon* v. *Bethell*, 2 Eden's Rep. 110; or receive or demand interest; *Trash* v. *White*, 3 Bro. Ch. Rep. 289; or consents that the mortgage should be redeemed;

is in nature of a Welch mortgage, and in such case, the length of time is no objection (4).

(4) *Orde* v. *Hemming*, 1 Vern. 418.

Proctor v. *Oates*, 2 Atk. 140. Still less does the rule apply, where the mortgagor continues in possession even of a part of the mortgaged premises; *Rakestraw* v. *Brewer*, Sel. Ca. Ch. 55. See also *Corbett* v. *Barker*, 3 Anstr. 755. It may be proper in this place to advert to the St. 4 & 5 W. & M. c. 16, which takes from a mortgagor the right of redemption, if he afterwards mortgage the same premises without communicating by notice in writing the prior incumbrance to the subsequent mortgagee; see *Stafford* v. *Selby*, 2 Vern. 589; in which case several points are determined upon the construction of this statute.

SECTION VIII.

See Lord Hale's Jurisdiction of the Lords, 108.

AND this court cannot shorten the time of redemption which the parties have agreed upon (*p*) but when that is past (*q*), the

(*p*) The right of redemption is not confined to the mortgagor, his heirs, executors, assignees, or subsequent incumbrances; but extends to all persons claiming any interest whatever in the premises, as against the mortgagor; therefore a person claiming under a

practice is to forclose (1). Yet at the common law, in the case of infants, the parol was to demur, and the infant is not bound to answer till full age, and the register, parliament, and common law give no execution against the infant heir, though the debt were clear and indisputable; as

(1) *Bonham* v. *Newcomb*, 2 Ventr. 364.

deed, void (as being voluntary), against a subsequent mortgagee, may redeem, for the deed though void as to the mortgagee, is binding on the mortgagor; *Rand* v. *Cartwright*, 1 Ch. Ca. 59. 1 Vern. 193; à fortiori may any person who has acquired for valuable consideration, an interest in the land, as a tenant under the mortgagor; *Keech* v. *Hall*, Doug. Rep. 21, 22; or a judgment-creditor; having previously sued out a writ of execution; *King* v. *Marrissall*, cited in *Shirley* v. *Watts*, 3 Atk. 200; or a tenant by elegit, statute merchant or staple, or a tenant by the curtesy or in dower; *Jones* v. *Meredith*, Bunb. 346; or a jointress; *Howard* v. *Harris*, 1 Vern. 33; the crown may also redeem estates mortgaged and afterwards forfeited by the treason, &c. of the mortgagor; *Attorney General* v. *Crofts*, 1 Bro. P. C. 222.

(*q*) The mortgagee may not only institute his suit in equity to foreclose, but may at the same time, if out of possession, (except under particular circumstances,) bring an ejectment at law to obtain the possession; *Booth* v. *Booth*, 2 Atk. 343; or if the personal estate be deficient, and the heir and personal representative of the mortgagor be the same person, he may pray a sale of the mortgaged premises in the first instance. *Daniel* v. *Skipwith*, 2 Bro. Ch. Rep. 155.

by a judgment or statute; but the contrary is done in Chancery (2). However, in equity, the interest of infants is so far regarded and taken care of, that no decree shall be made against an infant (*r*) without having a day given him to shew cause after he comes of age (3). And there being an infant in the case, we cannot foreclose him without a day to shew cause (*s*) after he comes of age. But the proper way in such a case is to decree the lands to be sold to pay the debts, and that will bind the infant (4). So if lands are devised to be sold for payment of debts, the lands may be decreed to be sold without giving the heir, who is an infant, a day to shew cause, when he comes of age; for nothing de-

(2) *Anon.* 2 Ch. Ca. 164.

(3) *Lord Falkland* v. *Bertie*, 2 Vern. 342.

(4) *Booth* v. *Rich*, 1 Vern. 295. *Bennett* v. *Edwards*, 2 Vern. 392.

(*r*) This protection is peculiar to the disability of infancy; for a feme covert may be foreclosed, and shall have no day given to her or her heirs to shew cause after the coverture is determined; *Mallack* v. *Galton*, 3 P. Wms. 352; unless there be some fraud or collusion. As to cases in which equity will open the foreclosure, see Powell on Mortgages, 448.

(*s*) The only cause, however, which he is then allowed to shew, is error in the decree; for he is permitted neither to redeem, nor to travel into the accounts; *Mallack* v. *Galton*, 3 P. Wms. 352. *Lyne* v. *Willis*, Rolls, 13 May, 1730.

scends to him. But if he is decreed to join in the sale, he must have a day after he comes of age (5). But although if an infant answer by guardian, upon which a decree is made, without any day given him to shew cause, it shall not be read or admitted as evidence against him when he comes of age (6); yet an infant shall be bound by an offer made by him in his answer, if the other side are thereby delayed, and he do not immediately after his coming of age apply to the court in order to retract his offer, and amend his answer (7). And some say, there is scarce any case where an infant hath time to shew cause against a decree, but where it is necessary for him to join in a conveyance, as in case of foreclosure or the like (8).

(5) *Cooke* v. *Parsons*, 2 Vern. 429. Pre. Ch. 185.

(6) *Leving* v. *Caverley*, 1 Eq. Ca. Ab. 281. c. 5.

(7) *Cecil* v. *Salisbury*, 2 Vern. 224.

(8) *Whitchurch* v. *Whitchurch*. 8 Mod. 128.

SECTION IX.

By the civil law, the mortgage is properly a security only for the debt itself for which it was given, and the consequences of it, as the principal sum and interest, and the costs and damages laid out in preserving it (*t*). But he that will have equity to help where the law cannot, shall do equity to the party against whom he seeks to be relieved (1). And upon this rule a mortgage, given as a counter-security to a joint obligator, shall stand as a security for a second joint bond, entered into by the same person afterwards, without any agreement for that purpose; and the heir shall not redeem without saving harmless against both (2). So if the mortgagor borrows money of the mortgagee, and gives bond for it, the heir of the mortgagor shall not redeem (*u*) with-

(1) Francis' Maxims, Max. 1.

(2) *St. John* v. *Holford*, 1 Ch. Ca. 97.

(*t*) See Dig. lib. 13. tit. 7. s. 8.

(*u*) But though the heir cannot himself redeem, without discharging both the mortgage and bond, yet if the heir assign the equity of redemption, his assignee

out also paying the debt by bond, if that the mortgagor bound himself and his heirs in the bond (3); for it is a known rule in equity, that where there is an estate subsisting at law, equity will not destroy it, unless the party redeeming will satisfy all equitable demands out of the estate (*x*). And the

(3) *Shuttleworth* v. *Laywick*, 1 Vern. 245. *Windham* v. *Jennings*, 2 Ch. Rep. 128. *Coleman* v. *Wynch*, 1 P. Wms. 775.

Powis v. *Corbett*, 3 Atk. 556. *Troughton* v. *Troughton*, 1 Ves. 87.

may redeem, upon payment of the mortgage only; *Coleman* v. *Winch*, 1 P. Wms. 775. *Bayly* v. *Robson*, Pre. Ch. 89; as may also subsequent incumbrancers, *Morrett* v. *Paske*, 2 Atk. 54. Nor shall the mortgagee be permitted to tack his bond even against specialty creditors. *Lowthian* v. *Hazel*, 3 Bro. Ch. Rep. 162. For, as observed by Lord Thurlow in the above case, "the only reason why the mortgagee can tack his bond to his mortgage, is to prevent a circuity of suits; it is solely matter of arrangement; for in natural justice, the right has no foundation." See also *Heams* v. *Bance*, 3 Atk. 630. *Powis* v. *Corbet*, 3 Atk. 356. Nor shall a mortgagee of a copyhold estate tack a judgment to his mortgage, because no judgment can affect that estate. *Heir of Cannon* v. *Pack*, 6 Vin. Ab. 222. pl. 6.

(*x*) And, therefore, if there be two mortgages, and one be defective, the court will not suffer one to be redeemed without the other. *Purefoy* v. *Purefoy*, 1 Vern. 29. *Shuttleworth* v. *Laywick*, 1 Vern. 245. *Mergrave* v. *Le Hooke*, 2 Vern. 207. *Pope* v. *Onslow*, 2 Vern. 286. *Ex parte Carter*, Amb. Reports, 733. *Roe* v. *Soley*, 2 Bla. Rep. 726. *Willie* v. *Lugo*, 2 Eden's Rep. 78. *Ireson* v. *Denn*, 2 Cox's R. 425. But see *ex parte*

law is the same of an executor, in case of a mortgage of a lease for years, though no special agreement, that the bond debt should stand secured by the mortgage (4). So of the mortgagor himself, he must pay all that was due on note, or simple contracts, or bonds (5). But this last point has been denied by some, and a diversity taken between the mortgagor himself and his heir (6); for the land in the hands of the heir is chargeable with the bond debt even at law. And since the statute against fraudulent devises (7), the devisee of the equity of redemption is in the same case with the heir (*y*): because the statute makes such devise void, as against creditors (8); but, before that statute, such devisee would not be liable to the bond debt (9).

(4) *Anon.* 2 Vern. 177.

(5) *Baxter* v. *Manning*, 1 Vern. 244.

(6) 1 q. Ca. Ab. 352. note (a).

(7) 3 W. & M. c. 14.

(8) *Challis* v. *Casborn*, 1 Eq. Ca. Ab. 325. c. 9.

(9) *Baily* v. *Robinson*, 1 Eq. Ca. Ab. 325. note (b.)

King, 1 Atk. 300. *Jones* v. *Smith*, 2 Ves. 372. and the cases there cited. See, as to other securities, *Praed* v. *Gardiner*, 2 Cox's R. 90.

(*y*) Unless the devise be in trust for the payment of debts. *Heams* v. *Bance*, 3 Atk. 630.

SECTION X.

As for pawns, they differ in this respect from mortgages, as appears by the following case: *A.* pawned some jewels to *K.*, who signed a writing that they were to be redeemed in twelve months, otherwise they were to be as bought and sold. *K.*, within a short time after, delivers over the jewels, together with some plate of his own, to *M.*, as a pledge for 200*l.*; and *K*, afterwards borrowed 30*l.* and 50*l.* of *M.*, on promissory notes, to be repaid on demand. Although *M.* was a bookseller, and did not deal in plate or jewels, and so had not gained any property as having bought in a market ouvert, yet it is natural to think, although he took notes for the 30*l.* and 50*l.*, that the pawn was not to be parted with until that money as well as what was before lent was paid. And it is to be looked upon as an account current between *K.* and *M.*, and therefore he might retain what he had in his hands, until the balance was paid; but the goods of *K.*, which were pawned first,

are to be first applied, as far as the value thereof would extend (*z*) (1).

(1) *Demainbray* v. *Metcalf*, 2 Vern 698. Pre. Ch. 420. Gilb. Rep. 104. *Ex parte Deeze*, 1 Atk. 229. *Ex parte Oxenden*, 1 Atk. 236. See *Jones* v. *Smith*, 2 Ves. jun. 278.

(*z*) As to some other points of difference, see Puff. b. 5. c. 10.

SECTION XI.

But in this, both pawns and mortgages agree, that the act, for which the defendant is to pray equity against the plaintiff must be done to the plaintiff himself, or to his representative; for if the mortgagor mortgage the equity of redemption (*a*), and the second mortgagee brings a bill to redeem, he shall not be obliged to pay the bond debt, since the money was not lent to

(*a*) Otherwise, if the mortgagor borrow more money of the mortgagee, and agree that such further sums shall be secured on the mortgaged premises. *Matthews* v. *Cartwright*, 2 Atk. 347. *Ex parte Knott*, 11 Ves. 617. As to buying in old securities to protect the title of a mortgagee, see B. 3. c. 3.

him (1). So the assignee of the equity of redemption shall not be affected by a judgment, after confessed by the mortgagor, though the judgment-creditor purchase in the mortgage, but shall redeem, upon payment of the first mortgage money only (2). So if tenant for life, remainder to his son in tail, mortgage the lands, and the son after borrow money of the mortgagee, and give the lands as a security, yet he may redeem without paying his father's mortgage; for the son is a stranger to the father, and all one as stranger (3).

(1) *Brereton* v. *Jones*, 1 Eq. Ca. Ab. 325. c. 10.

(2) *Brereton* v. *Jones*, 2 Eq. Ca. Ab. 325. c. 11.

(3) *Bromley* v. *Hammond*, 2 Ch. Ca. 23.

SECTION XII.

But, further, the mortgagee is to be considered as a creditor beyond the security he has taken (*b*). As, where *A.* lent a sum of

(*b*) If mortgagee, after decree of foreclosure, though signed and enrolled, proceed at law against the mortgagor upon any collateral security, such proceedings will open the foreclosure; *Dashwood* v. *Blythway*, 1 Eq. Ca. Ab. 317, c. 3. But, quære, whether, if the

money on the mortgage of some houses, and had a bond for payment of the money, as usual in such cases; afterwards he lent a sum of 2,000*l.* on the equity of redemption, and had a bond for that likewise; and then the mortgagor becomes a bankrupt; and, by some accident, the value of the houses sunk so much, that they were not sufficient to raise the mortgage-money, first lent, on a bill brought to have them sold; and that, as to so much as they fell short to answer the first mortgage-money, the mortgagee might come in upon his bond as a creditor, it must be so decreed; and as to the 2,000*l.* lent upon the equity, which was worth nothing, it must stand singly upon the bond (1). So where a man borrows on the mortgage of a ship, and covenants to repay the insurance-money, but there was no covenant for repayment of the princi-

(1) *Wiseman* v. *Carbonell*, 1 Eq. Ca. Ab. 312. c. 9. *See ex parte Herbert*, 13 Ves. 183. *Baker* v. *Harris*, 16 Ves. 397.

mortgagee after foreclosure has sold the pledge, and his debt not satisfied, equity will restrain him from proceeding on the bond? See *Tooke* v. *Hartley*, 2 Bro. Ch. Rep. 125. The safer course is for the mortgagee to pray a sale;—but note, he cannot pray a sale without previously praying a foreclosure. Nor as against the infant heir of mortgagor will the court decree a sale, without inquiring whether it will be for the benefit of the infant. *Mondey* v. *Mondey*, 1 Vez. & B. 222.

pal money itself (*c*), the mortgagee treated with a person concerning the insurance, but could not agree for the rate, and thereupon the ship went out, and was lost in the voyage; since, if he had taken no security at all for his money, he had then without question been a creditor by simple contract, surely the taking security ought not to put him in a worse condition, especially now the security being lost (2). And in case of pawns, even at the common law, if the pawn is lost without the default of the pawnee, he may have an action for his money against the pawnor (3).

(2) Cited in *King* v. *King*, 3 P. Wms. 360.

(3) 2 Salk. 523.

(*c*) Every loan creates a debt from the borrower, whether there be a bond or covenant for payment or not; *Howell* v. *Price*, 1 P. Wms. 291; *Balsh* v. *Hyham* 2 P. Wms. 453. So if the personal debt be also secured by mortgage, see *Howell* v. *Price*, 1 P. Wms. 291, and the cases cited in Mr. Cox's note (1) 5th ed. *Meynell* v. *Howard*, Pre. Ch. 61.

SECTION XIII.

YET notwithstanding that, by the common law, the mortgagee of lands has an absolute interest, and by the covenant for quiet enjoyment, &c. till default of payment, the mortgagor is but tenant at will to the mortgagee (*d*); in natural justice and equity, the principal right of the mortgagee is to the mortgage-money (*e*), and

(*d*) But the mortgagee cannot entitle himself to rents and profits received by the mortgagor whilst he was permitted to retain possession; *Coleman* v. *D. of St. Albans*, 3 Ves. 25.

(*e*) The reasoning of Lord Keeper Finch upon this point, in the above case of *Thornborough* v. *Baker*, is so clear and satisfactory, that I cannot refrain from transcribing it. "By the common law, if the conditions of defeazance of a mortgage of inheritance be so penned, that no mention is made either of heirs or executors to whom the money should be paid, in that case the money ought to be paid to the executor, in regard that the money came first out of the personal estate, and therefore usually returns thither again; but if the defeazance appoints the money to be paid

his right to the land is only as a collateral security for the payment of it (1). And

(1) *Thornborough* v. *Baker*, 1 Ch. Ca. 283. Co. Lit. 209 b. 210.

either to heirs or executors disjunctively, there, by the law, if the mortgagor, paid the money precisely at the day, he may elect to pay it either to the heirs or executors, as he pleaseth. But where the precise day is past, and the mortgage forfeited, all election is gone in law; for in law there is no redemption. Then when the case is reduced to an equity of redemption, that redemption is not to be upon payment to the heir or executors of the mortgagee, at the election of the mortgagor; for it were against equity to revive that election; for then the mortgagor might defer the payment as long as he pleaseth, and, at last, compound for payment of the money to that hand which will use him best; much less can the court elect or direct the payment as they please, for a power so arbitrary might be attended with many inconveniences throughout. Therefore, to have a certain rule in those cases, a better cannot be chosen, than to come as near unto the rule and reason of the common law as may be. Now the law always gives the money to the executor, where no person is named, and where the election to pay to either heir or executor is gone and forfeited in law, it is all one in equity as if neither heir or executor were named; and then equity ought to follow the law, and give it to the executor; for in natural justice and equity, the principal right of the mortgagee is to the money, and his right to the land is only as a security for the money. Wherefore when the se-

therefore, all mortgages (*f*) are to be looked upon as part of the personal estate,

curity descends to the heir of the mortgagee, attended with an equity of redemption, as soon as the mortgagor pays the money, the lands belong to him, and only the money to the mortgagee, which is merely personal, and so accrues to the executors or administrators of the mortgagee. And for this reason, a mortgage of an inheritance to a citizen of London hath been held to be part of his personal estate, and divided according to custom. And though it may seem hard that the heir should part with the land, and be decreed to make a recompence, without having the money which comes in lieu of the land, yet it will not seem so to them who consider that the land was never more than a security, and that after payment of the money, the land is in trust for the mortgagor, which the heir of the mortgagee is bound to execute; and his Lordship declared, that the right to a sum of money, which is a personal duty, ought always to be certain, and not to be variable upon circumstances. Wherefore, his Lordship did not think it material that the administrator in this case had assets without this money; for assets, or not assets, is not the measure of justice to executor or administrator, but serves only as a pretence to favour the heir, who either ought to have the money, if there be no assets, or not to have it, though there be assets. And, for the same reason, his Lordship did not think it material, that there wanted the circumstance of a personal covenant from the mortgagor to pay the money; for that though the case

unless the mortgagee, in his life-time, or by his last will, do otherwise declare or dispose of the same (*g*). And in regard the money came came first out of the personal estate, the law always gives the money to the executor, where no person is

of the administrator of the mortgagee had been stronger with it, yet it is strong enough without it. His Lordship declared, that he had considered the various precedents in this case which had been urged, whereof one did not come to the very point, there being a great difference between a mortgage and an absolute conveyance, with a collateral agreement to reconvey upon repayment of the purchase-money; the other late precedents which made for the heir being contrary to the more ancient precedents of this court; and to some modern precedents also, which seemed to his Lordship of more weight, his Lordship being of opinion, that all mortgages ought to be looked upon as part of the personal estate, unless the mortgagee, in his life-time, or by his last will, do otherwise declare and dispose of the same."

(*f*) Nor will the mortgage being in fee vary the rule; *Winn* v. *Littleton*, 2 Ch. Ca. 52. 2 Vent. 351. ——— v. *Hicks*, 1 Vern. 412. *Turner*'s case, 2 Vent. 348.

(*g*) That he may otherwise declare by his will, see *Noyes* v. *Mordaunt*, Gilb. Rep. 2. 2 Vern. 581.

named (*h*). And where the election to pay, either to the heir or executor, is gone and forfeited in law, it is all one in equity, as if neither heir or executor were named; and, therefore, to have a certain rule in these cases, equity ought to follow the law, and give it to the executor; and the right to a sum of money, which is a personal duty, ought always to be certain, and not variable upon circumstances; so that whether there are assets or not (*i*) or there wanted the circumstances of a personal covenant to pay the money, is not material. So although the mortgage be foreclosed, or if it be of so ancient a date, as, in the ordinary course of the court, not redeemable; yet, in case the mortgagee be not actually in possession (*k*), it shall be looked upon in his

(*h*) If the heir be named, that payment to him before forfeiture would be good. See *Noy* v. *Ellis*, 2 Ch. Ca. 220.

(*i*) See *Ellis* v. *Greaves*, 2 Ch. Ca. 50.

(*k*) It appears from *Fish* v. *Fisk*, Pre. Ch. 11, that if a mortgage in fee descend on the heir, and he buy in the equity of redemption, and there be no defect of assets, that he shall not be deprived of his advantage.

hands to be personal estate (2). But if the land be worth more than the money, the heir may well say, I will pay you the money, and take the benefit of the foreclosure to myself (3).

(2) *Awdly v. Awdly*, 2 Vern. 193.

(3) *Clerkson v. Bowyer*, 2 Vern. 67.

Q. If he could have compelled the executor to take the money before he had foreclosed.

CHAP. II.

Of Marshalling the Assets.

SECTION I.

AND although the money shall not be paid to the heir or assignee of the land, without naming him in the condition (1), yet the money may be paid by them in preservation of their inheritance, et qui sentit onus sentire debet et commodum. And it is equity that should make satisfaction, which received the benefit (2). As where the heir is indebted by mortgage made by his father, or by bond (3), or by other means, as heir to his ancestor, the personal estate in the hands of the executor shall be compelled to pay that debt (*a*) in ease of

(1) 1 Inst. 209.

(2) Francis's Maxims, Max. 4.

(3) *Armitage* v. *Metcalfe*, 1 Ch. Ca. 74.

(*a*) Unless the testator by express words, exempt, or otherwise clearly manifest his intention to exempt the personal estate. *Hall* v. *Brooker*, Gilb. Rep. 72. *Walker* v. *Jackson*, 2 Atk. 624. *Bamfield* v. *Wyndham*, Pre. Ch. 101. *Wainwright* v. *Bendlowes*, 2 Vern. 718. *Stapleton* v. *Colvill*, Forrest. 202. *Leman* v. *Newnham*,

the heir (4); and especially in case there be sufficient to pay the debt by the mort-

(4) *Cope* v. *Cope*, 2 Salk. 449, 450. *Howell* v. *Price*, 1. P. Wms. 291. *Gower* v. *Mead*, Pre. Ch. 2. and cases cited, note (a.)

1 Ves. 51. *Duke of Ancaster* v. *Meyer*, 1 Bro. C. R. 454. *Burton* v. *Knowlton*, 3 Ves. 107. *Brummell* v. *Prothero*, 3 Ves. 111. *Bootle* v. *Blundell*, 1 Meriv. 193. *Morrow* v. *Bush*, 1 Cox's R. 185. *Webb* v. *Jones*, 1 Cox's R. 245. *Williams* v. *Bp. of Llandaff*, 1 Cox's R. 254. *Gittins* v. *Steele*, 1. Swans. 24. But the testator devising all his real estate, subject to payment of debts, will not alone be sufficient to exempt the personal estates; *Fereyes* v. *Robertson*, Bunb. 301. *Bridgman* v. *Dove*, 3 Atk. 202. *Haslewood* v. *Pope*, 3 P. Wms. 322. *French* v. *Chichester*, 2 Eq. Ca. Ab. 493. c. 5. 1 Bro. P. C. 192. *Lord Inchiquin* v. *Lord O'Brian*, 1 Wils. 82. Ambl. 33. 1 Cox's Rep. 1. *Samwell* v. *Wake*, 1 Bro. Ch. Rep. 144. *Duke of Ancaster* v. *Meyer*, 1 Bro. 454. *Read* v. *Lichfield*, 3 Ves. 477. *Webb* v. *Jones*, 2 Bro. Ch. Rep. 60; but it has been held, that if the real estate be directed to be sold for the payment of debts, and the personal bequeathed to a legatee, that the personal estate shall not be applied in ease of the real. *Wainwright* v. *Bendlowes*, 2 Vern. 718. Gilb. Rep. 125. Pre. Ch. 451. *Bamfield* v. *Wyndham*, Pre. Ch. 101. *Walker* v. *Jackson*, 2 Atk. 624; but this rule does not apply where the personal estate is not expressly bequeathed, see *Gray* v. *Minnethorpe*, 3 Ves. 103. That if the residuary legatee, entitled to the benefit of the exemption, die in the life-time of the testator, whereby the bequest of the residue becomes lapsed, the executor or next of kin shall not have the benefit of such exemption; see *Waring* v. *Ward*, 5 Ves. 670. Quære, whether the heirs would not, as against the devisee, be

gage, &c. and the legacy out of the personal estate; for when both can be satisfied, both shall be satisfied. The reason is, because the personal estate is the fund for the payment of all debts (*b*) and the mort-

entitled to the benefit of the deliverance of the real estate devised from such charge, as a resulting trust, by failure of the purpose for which the charge was created? That parol evidence is admissible to shew that executrix legatee should have his personal estate exempt from his debts, see *Gainsborough* v. *Gainsborough*, 2 Vern. 252.

(*b*) The personal estate is certainly the general fund for the payment of debts; and where the real estate is only collaterally charged, the personal estate is primarily liable; but the rule is otherwise, where the charge is on the real estate principally, and the personal security or covenant is only collateral; for, in such case, the landholder enters into such covenant, relying upon the land enabling him to discharge it, and the money raised does not increase his personal estate, but is to exonerate the rest of the real estate. See *Countess of Coventry* v. *Earl of Coventry*, 2 P. Wms. 222. *Edwards* v. *Freeman*, 2 P. Wms. 437. *Wilson* v. *E. of Darlington*, Rolls, February 1785, in a note, 2 P. Wms. 664. *Leman* v. *Newnham*, 1 Ves. 51. *Ward* v. *Dudley*, 2 Bro. Ch. Rep. 316. *Lewis* v. *Nangle*, Amb. 150. *Duke of Ancaster* v. *Meyer*, 1 Bro. Ch. Rep. 454 *Tower* v. *Ld. Rous*, 18 Ves. 132. *Shafto* v. *Shafto*, 1 Cox's R. 207. So where the debt, although personal in its creation, was contracted originally by another, as where an estate is bought, subject to a mortgage, the

gage money is a debt, whether there be a covenant for payment in the mortgage deed or not (5); though some have been of a contrary opinion, where there is no covenant express or implied. But the personal estate of the father is not liable to the grandfather's debts, and therefore it shall not go in exoneration of the grandfather's mortgage of the lands descended to the grandson (6), unless the father had been executor to the grandfather, and had converted the assets to his own use.

(5) *Cope* v. *Cope*, 2 Salk. 449. *Meynell* v. *Howard*, Pre. Ch. 61. *Floyer* v. *Livington*, 1 P. Wms. 271.

(6) *Evelyn* v. *Evelyn*, 2 P. Wms. 664. *Bagot* v. *Oughton*, 1 P. Wms. 347. *Lawson* v. *Hudson*, 1 Bro. C. R. 58.

personal estate of the purchaser shall not be applied in exoneration of the real estate; see *Tweddell* v. *Tweddell*, 2 Bro. Ch. Rep. 101, unless the purchaser appear to have intended to make the debt his own; see *Pockley* v. *Pockley*, 1 Vern. 36. *Earl of Belvidere* v. *Rochford*, 6 Bro. P. C. 520. *Billinghurst* v. *Walker*, 2 Bro. Ch. Rep. 608. *Lechmere* v. *Charlton*, 15 Ves. 198. *E. of Oxford*, v. *Lady Rodney*, 14 Ves. 417. *Donisthorpe* v. *Porter*, 2 Eden's Rep. 162. *E. of Tankerville* v. *Fawcett*, 1 Cox's Rep. 237. *Basset* v. *Percival*, 1 Cox's Rep. 268; but a mere covenant for securing the debt will not be sufficient for such purpose, *Evelyn* v. *Evelyn*, 2 P. Wms. 664. *Forrester* v. *Leigh*, Ambl. 171. *Earl of Tankerville* v. *Fawcett*, 2 Bro. Ch. Rep. 57. *Tweddell* v. *Tweddell*, 2 Bro. Ch. Rep. 152. *Billinghurst* v. *Walker*, 2 Bro. Ch. Rep. 604. See 1 Eden's Rep. and cases cited, 39 to 47.

SECTION II.

So the wife being a jointress, and having granted a term for years only out of her estate for life, by fine with her husband for a mortgage, there rests a reversion in her, which naturally attracts the equity of redemption, although the equity of redemption was limited to the husband, and his heirs, by the deed of redemption; for that she was no party to it. And the husband having covenanted to pay this money, if there be assets sufficient, it shall be decreed clear to the wife (1); for the husband having had the money, is in equity the debtor (*c*),

(1) *Brend* v. *Brend*, 1 Vern. 213.

(*c*) The general rule is thus qualified by Lord Hardwicke, in *Lewis* v. *Nangle*, Ambl. 150: "The general rule is, that where the husband borrows a sum of money for his own use, and the wife joins in a mortgage of her jointure for repayment of it, that her estate shall be a creditor on the husband's for that sum. So it is where there is no settlement, and the wife mortgages her estate of inheritance to raise money for the husband: but there is no instance where, at the time of such mortgage or security made, if, at the same time, a settlement is made, either before or after marriage, that the husband was considered as answerable to the wife's estate

and the land is to be considered but as an additional security (2). And so it is if there were no express covenant. But all other debts (*d*) shall be first paid (3).

(2) *Pocock* v. *Lee*, 2 Vern. 604.

(3) *Tate* v. *Austin*, 1 P. Wms. 264. *Lord Huntingdon's* case, 2 Vern. 487.

for the money borrowed: that is an exception out of the general rule, otherwise it would be very inconvenient to men that were going to be married, and, nine times in ten, contrary to the intention of the parties." The general right of the wife may also be repelled by evidence to shew her intention that her own estate should bear the charge. *Clinton* v. *Hooper*, 3 Bro. Ch. Rep. 201. *Innes* v. *Jackson*, 16 Ves, 366.

(*d*) It is so laid down by Lord Cowper, Ch. in *Tate* v. *Austin*; but were the rule strictly so, it should seem to follow, that it could never have been doubted but that where the incumbrance has been paid out of the husband's personal estate, the other creditors of the husband might, pro tanto, come upon the wife's real estate, which Lord Hardwicke, in *Robinson* v. *Gee*, 1 Ves. 252, appears to have denied.

SECTION III.

And as the heir in many cases, has the assistance and favour of the court, as to make the personal estate first liable to debts, and to be applied in ease and exoneration of the real estate; so even an hæres factus has had that relief here (1). The reason is, because the hæres factus comes instead of the hæres natus by the will; and it is presumed to be the intention of the testator that he should have all the privileges of the hæres natus. And some say, that not only he who is hæres factus shall pray the aid of the personal estate to discharge the real, but even an ordinary devisee shall have that benefit (2). But the law seems otherwise (*e*). For if a man mortgages his

(1) *Pockley* v. *Pockley*, 1 Vern. 36. *Howell* v. *Price*, Pre. Ch. 477. *Bartholomew* v. *May*, 1 Atk. 487.

(2) *Pockley* v. *Pockley*, 1 Vern. 37.

(*e*) Lord Commissioner Rawlinson, in *Gower* v. *Mead*, Pre. Ch. 3, is reported to have said, that there was a diversity betwixt hæres factus and a devisee of particular lands; for a devisee of particular lands shall not have the benefit of the personal estate, but hæres factus of the whole estate shall. But this distinction has been long since over-ruled; and the opinion of Lord Nottingham, as stated in *Pockley* v. *Pockley*, is now the esta-

land, and then devises it to *J. S.* or to *A.* for life, the remainder in fee to *B.*, there the charge doth pass with such estate, for there appears no intent of the testator. So where the equity of redemption is purchased, the purchaser shall have no aid of the personal estate of the mortgagor, for he has made it his own debt (3.) Nor shall the heir him-

(3) 2 Salk. 450.

blished law of the court; *Galton* v. *Hancock*, 2 Atk. 436. And the devisee of a particular estate shall not only have his devised estate exonerated out of the personal estate, but, if there be another estate expressly devised for payment of debts, and the personal be excepted or exhausted, he may also resort to such devised estate, and that although the particular estate devised to him be devised subject to the incumbrances thereupon; *Serle* v. *St. Eloy*, 2 P. Wms. 385. *Astley* v. *E. of Tankerville*, 1 Cox's Rep. 82. So if the personal estate be exempt or exhausted, and there be no real estate expressly devised for payment of debts, but there be a descended estate, the devisee of a particular estate shall have such estate exonerated out of the descended estate; *Galton* v. *Hancock*, 2 Atk. 430; *Manning* v. *Spooner*, 3 Ves. 114. And see *Donne* v. *Lewis*, 2 Bro. Ch. Rep. 257, which states the order of affecting assets, and with which the decree is reconciled by the special directions of the will. It may, however, be proper to remark, that the equity, to have the personal estate applied in exoneration of the real, subsists only between the heir or devisee, and the residuary legatee, and not against creditors, or even against specific or general legatees; *Hamilton* v. *Worley*, 3 Ves. jun. 65.

self after the sale; for the equity that the heir has, is, that the lands may descend clear to the family (4.)

(4) *Wood* v. *Fenwick*, Pre. Ch. 206.

SECTION IV.

But regularly the personal estate must aid the heir (*f*), and an implied intent must not, without clear expression, alter the equitable general law (1). As if a man conveys his lands for payment of debts and legacies, and afterwards devises the personal estate, it shall nevertheless go in discharge of the real; because the remainder of the lands, after the debts and legacies paid, descends to the heir as heir, and he is not thereby disinherited. And although there be an express devise to the executor, yet that is only after debts and legacies paid, and being no more than the law gave him, is a void devise (2). A fortiori, if the devise to the executrix be in the same clause in which

(1) *Lord Grey* v. *Lady Grey*, 1 Ch. Ca. 297. *Anon.* 2 Vent. 349. *Davis* v. *Gardiner*, 2 P. Wms. 187.

(2) *Haslewood* v. *Pope*, 3 P. Wms. 322.

(*f*) So also the devisee; see s. 3. note (*e*).

she was named executrix: for it not being said, free and exempt from payment of debts, she must therefore take it as executrix (3). Otherwise, if a man devises lands for payment of debts and legacies, and the overplus to the heir, or to the heir and a stranger, as they call it in Chancery, out and out. For there is a difference between charging an estate with payment of debts, and devising an estate to be sold out and out, to pay debts (4); since, in this case, the intent appears to be, that he should take the overplus as a money legacy only, and that the land should not descend to him as heir at all.

(3) *French* v. *Chichester*, 2 Vern. 568. *Cutler* v. *Coxeter*, 2 Vern. 302.

(4) *Wainwright* v. *Bendlowes*, 2 Vern. 718. Pre. Ch. 451. Gilb. Lex Prætoria, 313. *Feltham's* case, 1 Lev. 203. See also *Donne* v. *Lewis*, 2 Bro. Ch. Rep. 264. *Manning* v. *Spooner*, 3 Ves. 117. *Harmond* v. *Oglander*, 8 Ves. 125.

SECTION V.

AND if there be no assets to answer the intent of the testator on his legacies, the heir (*g*), shall have no assistance of the personal estate (1); for this would be to overthrow the testator's express intent by an implied one, that the land was to descend free to the heir, and to take away from a man the disposal of his own property. So if the personal estate were devised to a stranger, and not to the executor; for such devise must then be taken as a legacy. So if the devise were of a specific legacy (2), or any certain sum to the executor, for the same reason. So if he devise all his goods, chattels, and household stuff in such an house to another, and then goes on in these words: *All the rest and residue of my personal estate I give and devise to my wife, whom*

(1) *Anon.* 2 Ch. Ca. 4, 5.

(2) *Oneal* v. *Mead*, 1 P. Wms. 692. *Middleton* v. *Middleton*, 2 Ch. Rep. 170. *Long* v. *Short*, 1 P.Wms. 403. *Tipping* v. *Tipping*, 1 P. Wms. 729. *Rider* v. *Wager*, 2 P.Wms. 335.

(*g*) Neither shall a devisee of a mortgaged estate; but in such case, if the mortgagee resort to the personal estate, a specific or pecuniary legatee shall stand in his room for so much out of the real estate; *Lutkins* v. *Leigh*, Forrest. 53. Ambl. 172. So if the mortgage include copyhold. *Aldrich* v. *Cooper*, 8 Ves. 382. But, quære, whether this rule extends to a merely residuary legatee?

I make sole executrix. For though the words, *rest and residue of his personal estate,* are generally understood, after debts, legacies, and funerals; yet here they are relative to the last antecedent, and pass to his wife, as a specific devise of what he had not before particularly devised (3). Much more, if there be an express clause to exempt the personal estate from payment of debts, the will of the testator shall be observed. And the heir can have no equity, in case of other creditors, to defeat them of their debts: for this even an express devise to him of the personal estate, could not have done (*h*).

(3) *Adams* v. *Meyrick*, 1 Eq. Ca. Ab. 271. Ca. 13.

(*h*) And therefore, equity will always marshal the assets in favour of creditors. See Francis's Maxims, p. 11. note (*a*). This must not be understood to include judgment creditors, for they are to be paid in the first instance. *Sharpe* v. *Earl of Scarborough*, 4 Ves. 538.

SECTION VI.

On the other side, it is but reasonable, that as the heir is to have equity, he should do it. And therefore, although regularly, where the parties are in equal degree, the executor or administrator may prefer which of them he thinks fit: yet equality is equity (1); and the court, where they have any foundation to go upon, usually marshals the assets, so as all parties may have satisfaction; for, Nemo ex alterius detrimento fieri debet locupletior. So if there be a debt owing to the king, the king's debt shall be satisfied out of the real estate, that the other creditors may be let in to have satisfaction of their debts out of the personal assets (*i*) (2).

(1) Francis's Maxims, max. 3.

(2) *Sagittary* v. *Hyde*, 1 Vern. 455.

(*i*) From the case referred to, and from *Porey* v. *Marsh*, 2 Vern. 182; and *Mills* v. *Eden*, 10 Mod. 489; *Lanoy* v. *D. of Athol*, 2 Atk. 446, it appears, that the court would formerly controul the creditor's right of election to resort to the real or personal fund. The present practice of marshalling being, however, in general sufficiently protective of the equity of other creditors, renders such

controlling interference in most cases unnecessary. There are still cases, however, to which the principle of the above decisions might be equitably applied; as in the above case of *Mills* v. *Eden*, where the election of the wife might have induced irreparable mischief to the creditors of the husband. So where an American subject might resort to a fund constituted by the act for the confiscation of the property of his debtor, an American loyalist, from which fund his debtor and other creditors are excluded. To cases like these the above principle appears to me to be applicable; and should it be objected, that it would break in upon the legal right of the party to elect, it is to be recollected, that no right ought to be allowed to be exercised in a manner prejudicial to the rights of others; nam sic utere tuo ut alienum non lædas. But see *Wright* v. *Simpson*, 6 Ves. 714, contra.

SECTION VII.

But equity is remedial only for those who come in upon a good consideration; so that, in case of legacies, there is a difference: for if the legacy be in satisfaction of a debt, or as a provision for younger children, or grand-children, then equity will marshal the assets, as for a simple con-

tract creditor (*k*). And the statute for settling intestates' estates has made a will for those that die intestate; and therefore the

(*k*) This distinction in favour of children and grandchildren is stated by Chief Baron Gilbert, Lex Prætoria, p. 307. But though it may have had some foundation as to children, (See *Herne* v. *Meyrick*, Salk. 416. 1 P. Wms. 201). I have not been able to find any authority upon which it can be extended to grand-children. It is not, however, necessary to consider the existence or foundation of such distinction, it having been long established, that as against the heir, equity will, in favour of legatees, (though their claim is not so strong as that of simple contract creditors. *Aldrich* v. *Cooper*, 8 Ves. 396,) marshal the real assets descended. *Culpepper* v. *Aston*. 2 Ch. Ca. 11. *Tipping* v. *Tipping*, 1 P. Wms. 730. *Lutkins* v. *Lee*, Forrest. 54. *Hanby* v. *Roberts*, Abl. 128. See *Scott* v. *Scott*, 1 Eden's Rep. 458. And it is now determined, that the same equity prevails against a devisee, if the estate be devised for or subject to the payment of debts; *Pope* v. *Haslewood*, 3 P. Wms. 323. *Webster* v. *Alsop*, 12th July 1791. *Bradford* v. *Foley*, 14th August 1791, stated in a note. *Foster* v. *Cook*, 3 Bro. Ch. Rep. 347. But such equity does not extend to a devisee, whose estate is not subjected to payment of debts. *Clifton* v. *Burr*, 1 P. Wms. 678. *Forrester* v. *Leigh*, Ambl. 171; except where the personal estate has been applied in exonerating the devised estate of a mortgage, or other real charge upon it, in which case the legatee shall be allowed to come upon the devised estate pro tanto. *Lutkins* v. *Leigh*, Forrester, 53. Not so of a bond, or other specialty, not immediately charging the land; 1 P. Wms. 678. See also *Keeling* v. *Brown*, 5 Ves. 362.

younger children of one dying intestate shall have the same advantage, as if their shares had been respectively devised to them (1). But otherwise it is, if the legatees were volunteers or collateral relations, for whom the testator was not obliged, by the law of nature, to provide, or were provided for in the life of the testator (2). And since the heir is not disinherited by the will, the value of what descends to him must be looked upon as much a designed provision for him, as an express devise is for the younger children; and therefore he must abate in proportion out of his provision, in the same manner as each of the younger children are to abate out of the respective provisions, where there is not sufficient to answer them all, so that the heir must have as much as all the legatees taken together (3). But if there be a bountiful provision for the heir, as where there is as much left in reserve for him as is taken out for a provision for all the younger children legatees, in such case the legatees shall have their whole legacies.

(1) *Mill* v. *Darrel*, 2 Vern. 309. So said, but not decreed.

(2) *Herne* v. *Meyrick*, 1 P. Wms. 201. 1 Salk. 416.

(3) Gilb. Lex Prætaria, 307.

CHAP. III.

Of buying in old Securities to protect a Title.

SECTION I.

In æquali jure melior est conditio possidentis. Where equity is equal, the law shall prevail (1), and he that hath only a title in equity shall not prevail against law and equity. As a purchaser (*a*) or mortgagee

(1) Francis's Maxims, max. 14.

(*a*) But neither a judgment creditor, nor a creditor by statute, is a purchaser within this rule; and therefore, if a judgment or statute creditor, being the third incumbrancer, buy in the first mortgage, he shall not unite the first mortgage to his judgment or statute, because he did not lend his money on the credit of the land; whereas, if a third mortgagee buy in a statute, which is the first incumbrance, he shall be allowed to unite the statute to the third mortgage; because the land was in his view and contemplation when he lent the money. *Brace* v. *Duchess of Marlborough*, 2 P. Wms. 491. Mosely, 50. *Morret* v. *Paske*, 2 Atk. 53. *Anon.* 2 Ves. 662. *Brereton* v. *Jones*, 1 Eq. Ca. Ab. 325. c. 10. *Hamerton* v. *Rogers*, 1 Ves. jun. 513. See also *Wynn* v. *Williams*, 5 Ves. 130. *Belchier* v. *Butler*, 1 Eden's Rep. 523. But see *Wright* v. *Pilling*, Pre. Ch. 494.

coming in upon a valuable consideration without notice (*b*), and purchasing in a pre-

(*b*) The equity of a subsequent mortgagee buying in a prior security, in order to protect such subsequent mortgage, is founded not merely on his being a purchaser for valuable consideration, but on his being such without notice of the mesne incumbrances at the time of his purchase. If, therefore, such mortgagee can be effected either with actual or constructive notice before payment of the purchase money, or execution of the conveyance, he shall not prevail against the mesne incumbrancer. See B. 2. c. 6. s. 2. note (*i*). As to what shall amount to constructive notice, it were extremely difficult to extract from the cases any general rule upon the subject; it seems, however, to have been held, that every man shall be presumed to have notice of a decree: *Wortley* v. *Birkhead*, 2 Ves. 571. *Sorrel* v. *Carpenter*, 2 P. Wms. 482. But see *Worsley* v. *Earl of Scarborough*, 3 Atk. 392. So of the instrument under which the party with whom he contracts, as executor or trustee, derives his power. *Mead* v. *Lord Orrery*, 3 Atk. 238. *Drapers Company* v. *Yardley*, 2 Vern. 662. It seems also agreed, that where a purchaser cannot make out a title, but by a deed which leads him to another fact, he shall be presumed to have notice of such fact. *Moor* v. *Bennett*, 2 Ch. Ca. 246. *Bisco* v. *Earl of Banbury*, 1 Ch. Ca. 291. *Bovey* v. *Smith*, 1 Vern. 149. *Mertins* v. *Jolliffe*, Ambl. 311. *Taylor* v. *Stibbert*, 2 Ves. jun. 437. So whatever is sufficient to put a party on an inquiry is good notice in equity. *Smith* v. *Low*, 1 Atk. 490. *Ferrars* v. *Cherry*, 2 Vern. 384. *Daniels* v. *Davison*, 16 Ves. 250. *Howorth* v. *Deem*, 1 Eden's Rep. 351. In what cases notice to the agent, &c. will bind the principal, see B. 2. c. 6. s. 4. *Sheldon* v. *Cox*, 2 Eden's Rep. 224.

cedent incumbrance (*c*), it shall protect his estate against any person that hath a mortgage subsequent to the first and before the last mortgage, though he purchased in the incumbrance after he had notice of the second mortgage (*d*); for he has both law and equity for him (2). It is true, there have been strong arguments used against the unreasonableness of this practice, and there might likewise be strong reasons brought for the maintaining it; and so it was at first a case very disputable (*e*); but being

(2) *Marsh* v. *Lee*, 2 Ventr. 337. 1 Ch. Ca. 162. *Churchill* v. *Grove*, 1 Ch. Ca. 36. *Higgon* v. *Calamy*, 1 Ch. Ca. 149.

(*c*) The incumbrance here adverted to must be such as would be available at law; for, if it be deficient in any of the requisites to give it legal efficacy, it shall not prejudice the intermediate incumbrance. See *Fothergill* v. *Kenrick*, 2 Vern. 234. *Oxwick* v. *Plumer*, 3 Ba. Ab. 644.

(*d*) See 2 Vent. 339. 2 Ves. 574.

(*e*) Lord Hardwicke, in his judgment, in the case of *Wortley* v. *Birkhead*, observes, "as to the equity of this court, that a third incumbrancer having taken his security or mortgage without notice of the second incumbrance, and then being puisne taking in the first incumbrance, shall squeeze out and have satisfaction before the second, that equity is certainly established in general, and was so in *Marsh* v. *Lee*, by a very solemn determination by Lord Hale, who gave it the term of the creditors *Tabula in Naufragio*; that is, the leading case. Perhaps it might be going a good way at first

long since settled, the court will not now suffer that point to be stirred (3); but it may be they will, where they find a man designing a fraud, and who thinks to make a trade of cozening by the rules of the court (4). So though it were purchased pendente lite between them, for a discovery and conveyance, the first mortgage being satisfied (5): but otherwise if after a de-

(3) *Edmonds* v. *Povey*, 1 Vern. 187. *Brae* v. *Duchess of Marlborough*, 2 P. Wms. 492.

(4) *Edmunds* v. *Povey*, 1 Vern. 187.

(5) *Hawkins* v. *Taylor*, 2 Vern. 29.

but it has been followed ever since, and, I believe, was rightly settled; but rightly settled only on this foundation, by the particular constitution of the law of this country. It could not happen in any other country but this, because the jurisdiction of law and equity is administered here in different courts, and creates different kinds of rights in estates; and, therefore, as courts of equity break in upon the common law, where necessity and conscience require it, still they allow superior force and strength to a legal title to estates; and therefore, where there is a legal title and equity of one side, this court never thought fit, that by reason of a prior equity against a man who had a legal title, that man should be hurt, and this by reason of that force this court necessarily and rightly allows to the common law, and to legal titles; but if this had happened in any other country, it could never have made a question; for if the law and equity are administered by the same jurisdiction, the rule qui prior est tempore potior est jure must hold." See *Willoughby* v. *Willoughby*, 1 Term R. 1763. *Maundrell* v. *Maundrell*, 10 Ves. 246. *Mackreth* v. *Symmons*, 15 Ves. 355; in which last case, the doctrine of the court is fully considered by Lord C. Eldon.

cree made (6). So though nothing be due upon it (7), or it be obtained by undue means, as without any consideration or by fraud (8); for the practice is not material to secure a just debt. So if the purchase were of a precedent statute by the last mortgagee (7), he shall not be brought to any account upon this in equity by the second mortgagee, any otherwise than he may do at common law upon a scire fac' ad computand', viz. not according to the true value, but upon the extended value (*f*) for the whole debt and damages (10): and this although the extended value was but a third part of the true value. Same law of a purchaser; and there is no difference whether it was brought in before the purchase or after. So that by protecting is meant making all the advantages of it (*g*) that the law admits of.

(6) *Snelling* v. *Squib*, 2 Ch. Ca. 48. *Earl of Bristol* v. *Hungerford*, 2 Vern. 525. *Wortley* v. *Birkhead*, 2 Ves. 571.

(7) *Marsh* v. *Lee*, 1 Ch. Ca. 166. *Stanton* v. *Sadler*, 2 Vern. 80.

(8) *Hitchcock* v. *Sedgwick*, 2 Vern. 158. *Sir John Fagg*'s case, cited 2 Vern. 52, 53.

(9) *Higgon* v. *Calamy*, 1 Ch. Ca. 149.

(10) *Earl of Huntingdon* v. *Greenvill*, 1 Vern. 49.

(*f*) Quære, whether the mortgagee shall not account for what he hath received, if he hath received enough to satisfy the whole of his demand. See *Godfrey* v. *Watson*, 3 Atk. 517. *Quarrell* v. *Beckford*, 1 Maddocks, 269. How mortgagees shall account, see Powell on Mortgages, chap. 14.

(*g*) As to the terms of redemption, see B. 3. c. 1. s. 9. notes (*u*) (*x*).

SECTION II.

So where the second mortgagee agreed with the executor of the conuzee to put the statute in execution at his cost, and to pay him the debt due on the statute, after such time as the statute should be extended, and an assignment made thereof; for a thing agreed to be done is looked upon in equity as really done; and he shall not only defend himself as to the land that is in his mortgage, but for so much as is contained in the statute (1). But if a man is seised of sixty acres, and mortgages twenty to *A.*, and then mortgages the whole to *C.*, who purchases in the first mortgage, that shall not protect more than the twenty acres; but it shall protect these twenty acres, so as *B.* shall never recover that, until he pay *C.* all the money upon the first and last mortgage (2).

(1) *Windham* v. *Ld. Richardson*, 2 Ch. Ca. 212, 213.

(2) 2 Ventr. 339.

SECTION III.

And it is now an established doctrine, that a purchaser bonâ fide, and without notice of any defect in his title at the time of his purchase, may lawfully buy in any statute, mortgage, or any other incumbrance; and, if he can defend himself by those at law, his adversary shall have no help in equity to set those incumbrances aside; for equity will not disarm a purchaser. And precedents of this kiud are very ancient and numerous, where the court has refused to give any assistance against the purchaser, either to the heir or to the widow (*h*), the fatherless, or to the creditors, or to one purchaser against another (*i*). And this rule in Chancery is in vindication of the common law, where

(*h*) See *Williams* v. *Lambe*, 3 Bro. Ch. Rep. 264, in which the widow appears to have been assisted in equity against a purchaser for valuable consideration, without notice.

(*i*) See *Burgh* v. *Francis*, Rep. Temp. Finch, 28.

the maxims which refer to descents, discontinuances, non-claims, and collateral warranties are only the wise acts and inventions of the law, to protect and quiet the possession and strengthen the right of the purchasers (1).

(1) *Dudley* v. *Dudley*, Pre. Ch. 249. *Holt* v. *Mill*, 2 Vern. 279. *Wynn* v. *Williams*, 5 Ves. 130.

BOOK THE FOURTH.

Of Last Wills and Testaments.

PART I.

Of Legacies.

CHAP. I.

How to be tried and expounded.

SECTION I.

IT is not pretended, that wills are of ecclesiastical conuzance sua natura (*a*), but only such as were made for pious uses (1); and,

(1) *Marriott* v. *Marriott*, Gilb. Rep. 205. Stra. 666.

(*a*) In England, the right of making a will may be considered to have existed from the earliest period of our law; for we have no trace or memorial when it did not exist; and we find intestacy referred to in the law before the conquest, and the distribution of the intestate's estate, after payment of the lord's heriot, directed according to the established law. " Sive quis

in England, it plainly appears, that the probate of testaments was originally in the county court. But the Conqueror made a law, that no matters of ecclesiastical conuzance shall be transacted in the county court (*b*). And although it is not disco-

incuriâ, sive morte repentinâ, fuerit intestatus mortuus, dominus tamen nullam rerum suarum partem, (præter eam quæ jure debetur hereoti nomine,) sibi assumito. Verum possessiones uxori, liberis et cognatione proximis pro suo cuique jure distribuantur." Leges Canuti, c. 68. 2 Bla. Com. 491. This crcumstance would, of itself, be sufficient to shew, that wills were not anciently with us considered as being, suâ naturâ, of ecclesiastical cognizance; since, at such period, an exclusive ecclesiastical jurisdiction does not appear even to have existed; but this point is rendered incontrovertible by the several authorities, which shew, that the probate of wills was anciently in the county courts, in which, until the conquest, the bishop and the sheriff sat together; Lamb. Saxon Laws, 64; without any sort of distinction between the lay and the ecclesiastical jurisdiction; 3 Bla. Com. 61. See also 4 Burn's Ecclesiastical Law, 187. Linwood, 174. Swinburne, 409, 5th ed. The learned reader who wishes to trace the ecclesiastical jurisdiction in testamentary matters by the rules of the civil and canon laws, will be highly gratified in the perusal of the argument of Lord Chief Baron Gilbert, in the case of *Marriott* v. *Marriott*, Gilb. Rep. 203. Stra. 666.

(*b*) This ordinance of William is comprised in a charter relating to the bishoprick of Lincoln; and thereby

vered how the bishop and earl divided their causes and jurisdiction after the said law,

he commanded, that no bishop or archdeacon should thenceforward hold plea de legibus episcopalibus in the hundred court, nor submit to the judgment of secular persons, in a cause which related to the cure of souls. But whoever was proceeded against for any cause or offence according to the episcopal law, should resort to some place which the bishop should appoint, and there answer to the charge, and do what was right towards God and the bishop, not according to the law used in the hundred, but according to the canons and the episcopal law. "And it was further ordered, that should any one, after three notices, refuse to obey the process of that court, and make submission, he should be excommunicated; and if need were, the assistance of the king and the sheriff might be called in. The king, moreover, strictly charged, that no sheriff præpositus, sive minister regis, nor any layman whatsoever, should intromit in any matter of judicature that belonged to the bishop." Wilkin's Leges Angl. Sax. p. 292, 293. This charter may be considered as the basis of our ecclesiastical courts; but it referring generally to pleas de legibus episcopalibus, and not defining the several objects of episcopal law, throws little light on the origin of ecclesiastical jurisdiction in matters testamentary, which, as not immediately allied to the spiritual function, do not appear to have been upon the establishment of a purely ecclesiastical court, subject to an exclusive ecclesiastical jurisdiction. See *Hensloe*'s case, 9 Rep. 38; but see *Manning* v. *Napp*, Salk. 37, which denies the law of *Hensloe*'s case. But however difficult it may be to state the precise period when the ecclesiastical court first acquired or took cognizance of

yet that of wills, it seems went wholly to the bishop and clergy; and the Saxon custom being changed, the Norman was introduced. Nor was the very name of the

testamentary matters, it seems agreed, that it was known and recognised in the reign of Henry II. and according to Sir H. Spelman, in the reign of Henry I. Sir H. Spelman (Origin of Probate of Wills,) observing, that in Scotland the cognizance of wills belonged to the ecclesiastical jurisdiction; and, he adds, doubtless then also in England. Glanville, (lib. 7. c. 6, 7.) having stated, that in the reign of H. II. the jurisdiction of personal legacies was in the temporal courts, observes, that notwithstanding this, if there was a question in the temporal courts, whether a testament was a true one or not, whether it was duly made, or whether the thing demanded was really bequeathed, such plea was to be heard and determined in the court christian; because all pleas upon testaments are properly cognizable before the ecclesiastical judge; and the reason why spiritual men have the proving of testaments, is, because it is to be intended that the spiritual men have better conscience than laymen, and that they have more knowledge what is most for the profit of the soul of the testator than laymen have. See Perkins, § 486; *Noel* v. *Wells*, 1 Lev. 235; but see *Chichester* v. *Phillips*, Raym. 404. But although it be true, that at present, the spiritual court is the only court that has jurisdiction in the probate of wills and granting of administration, yet from this general rule must be excepted all courts baron that have had probate of wills time out of mind, and have always continued that usage; such as the Manor of Mansfield,

ecclesiastical court, or court Christian, heard of before this division. But it is clear that in H. II.'s time, the jurisdiction of personal legacies was in the secular courts; and in Glanv. lib, 7. cap. 6 & 7, there is the form of the writ of a personal legacy. Yet that the spiritual court did, from the beginning of H. III., exercise a jurisdiction for recovery of legacies, is infallibly proved from Bracton (2), and the cases of that time (c). And though in legacies, as in tithes (3), the jurisdiction that gave the recovery of them was sometimes in one, and sometimes in the other court, before it was restrained to the spiritual only; yet

(2) Bracton, l. 2. c. 26. fol. 61.

(3) 2 Inst. 488.

and those of Cowle and Caversham in Oxfordshire, which courts Wentworth says, he himself kept. See Office of Executors, 43, Seld. de Testamentis. Godb. 59. Vaugh. 207. Shaw. 173.

(c) The ecclesiastical courts having once acquired jurisdiction over the probate of wills, its power to enforce the execution of them appears to have been a reasonable consequence; but we are not warranted, from any authority, to conclude, that such enlargement of jurisdiction obtained, at least generally, prior to the reign of H. III. See Seldon's Origin of the Ecclesiastical Jurisdiction of Testaments, 1 Atk. 628. But the ecclesiastical court is compellable to confide wills of real estate to parties having occasion to produce them in evidence, on receiving security. See *Morse* v. *Roach*, Stra. 961.

it seems beyond exception, that the spiritual jurisdiction over legacies was long before in practice. The beginning of this practice is as different to find as that of probates: but it is thought by some to have come from the canon in the Decretals.

SECTION II.

But it is without question, that the suit for a personal legacy may be brought in Chancery (*d*); and, if the matter has pro-

(*d*) An executor being, in equity, considered as a trustee for the legatee, with respect to his legacy, and as a trustee, in certain cases, for the next of kin, as to the undisposed surplus, is the true ground of equitable jurisdiction, in enforcing the payment of a legacy or distribution of personal estate. *Wind* v. *Jekyll*, 1 P. Wms. 575. *Farringdon* v. *Knightly*, 1 P. Wms. 544. That the jurisdiction of our courts of equity is, in such cases, more effective and protective of the interest of creditors and legatees, is evident in several instances, particularly in compelling executors to give security for a legacy payable at a future day, the executor appearing to have wasted the estate; *Duncombe* v. *Stint*, 1 Ch. Ca. 121; or to bring the fund into court, *Strange* v. *Harris*, 3 Bro. Ch. Rep. 365. Though

ceeded to a sentence in the ecclesiastical court, it is proper to come here for the executor's indemnity. And here legatees are to give security to refund, but not there; and this court will see the money put out for the children (1). And so a bill for distribution of an intestate's personal estate is very proper in this court; for the spiritual court in that case has but a lame jurisdiction, and there are no negative words in the act of parliament (2).

(1) *Horrell* v. *Waldron*, 1 Vern. 26.

(2) *Matthews* v. *Newby*, 1 Vern. 133. *Pamplin* v. *Galen*, 2 Ch. Ca. 95. *Anon.* 2 Ventr. 392. 2 Ch. Rep. 167. *Howard* v. *Howard*, 1 Vern. 134.

an action be then pending against him, but in that case the court will reserve to the executor liberty to apply, in the event of the plaintiff's at law recovering, and will in such event direct payment out of the fund to the plaintiff. *Yare* v. *Harrison*, 2 Cox's Rep. 377. And there are cases in which a court of equity will restrain proceedings in the ecclesiastical court for a legacy; as where a husband is suing for a legacy in right of his wife, because the ecclesiastical court cannot enforce the equity of the wife. See *Jewson* v. *Moulson*, 2 Atk. 420. *Tanfield* v. *Davenport*, Toth. 114. Pre. Ch. 548. *Hill* v. *Turner*, 1 Atk. 516. *Meals* v. *Meals*, 1 Dick. 373. And, for the same reason, an action at law cannot be maintained for a legacy; see *Dicks* v. *Strutt*, 5 Term Rep. 690.

SECTION III.

BUT a will, proved in the spiritual court, is not to be controverted here for fraud (1), although he shall have no aid of this court (2). Yet some think (3) the judgments of the ecclesiastical court ought to be as subject to the equity of this court as judgments in the courts of common law (*e*). And although at law (4) one executor is not liable to the devastavit of another, yet in the ecclesiastical courts, and by their law, if an executor prove the will, they

(1) *Plume* v. *Beale*, 1 P. Wms. 388. *Stephenton* v. *Gardner*, 2 P. Wms. 286. *Rex* v. *Vincent*, Stra. 481. *Bennet* v. *Vade*, 2 Atk. 324. See also *Noel* v. *Wells*; 1 Lev. 235.

(2) *Nelson* v. *Oldfield*, 2 Vern. 76.

(3) *Vanbrough* v. *Cock*, 1 Ch. Ca. 200.

(4) *Hargthorpe* v. *Milforth*, Cro. Eliz. 318.

(*e*) In the case of *Hill* v. *Turner*, 1 Atk. 514. Lord Hardwicke, having recognized the jurisdiction of the court in the case at bar, observed, that though the court cannot, on petition, prohibit the ecclesiastical court, yet they will restrain a person who has clandestinely married a ward of the court from enforcing the sentence of the ecclesiastical court, either against the infant or his guardian; and, in the case of *Sheffield* v. *Duke of Buckingham*, 1 Atk. 628, Lord Hardwicke restrained proceedings in a prerogative court, to controvert the validity of a will which had been already determined and acted upon. And see also *Barnsley* v. *Powell*, 1 Ves. 119, 184; and *Wild* v. *Hobson*, 2 Ves. & B. 105.

will charge him, though he intermeddle no farther (*f*), to pay the legacies (5). And the plaintiff is without relief by appeal from the sentence; because the judge's delegate must judge according to that law, and therefore this court should relieve him. And without question there may be a fraud in obtaining a will, which is relievable in equity (*g*) and of which no advantage can be taken at law; as if a man agrees to give the testator 2,000*l.* in bank bills, if he will devise his estate to him; and upon the delivery of these bills, he makes his will, and leaves his estate to him accordingly, and the bills after prove to be forged or counterfeit (6). But it has been settled, that a will of a real estate cannot be set aside, in a court of equity, for fraud or imposition,

(5) *Vanbrough* v. *Cock*, 1 Ch. Ca. 201.

(6) *Goss* v. *Tracey*, 1 P. Wms. 288. 2 Vern. 700 *Maundy* v. *Maundy*, 1 Ch. Rep. 66. *Welby* v. *Thornagh*, Pre. Ch. 123.

(*f*) The law here stated is in its principles so harsh, that I much doubt whether it be the law of the ecclesiastical courts; and I am strengthened in my doubt, by not finding any passage in support of it, either in Godolphin or Swinburne.

(*g*) I have already had occasion to consider the difference of decision upon this point; see B. 1. c. 2. § 3. *Wild* v. *Hobson*, 2 Ves. & B. 105.

but must be first tried at law, on devisavit vel non, being matter proper for a jury to inquire into (7).

(7) *Kerrick* v. *Brensby*, 3 Bro. P. C. 358. *Webb* v. *Claverden*, 2 Atk. 424.

SECTION IV.

In regard therefore, that cases of wills of personal estate are, for the most part, tried in the ecclesiastical courts, and by the rules of the civil and pontifical law, the king's judges must, in such cases judge after the law of the church, that there may be a conformity of laws (*h*). And thus, in

(*h*) The cases referred to in the margin(1) are direct authorities in support of our author's proposition. It seems, however, to be questioned by the Master of the Rolls, in the case of *Cray* v. *Willis*, 2 P. Wms. 530, his honour being reported to have said, "I do not see that a court of equity should, even in case of a legacy, judge according to the civil law, but ought rather to pursue the common law, which is the general law of the land; for all legatees are volunteers, and ought to stand or fall by the rules of the common law; and that this court does, in other cases, determine the

personal chattels the civil and canon law is to be considered (1). And there the rule is, where personal chattels are devised for a limited time, it shall be intended the use of them only, and not a devise of the things themselves, and so a remainder over of them is good (2). And although, in some cases a man is said to die without issue whenever there is a failure of issue, as to the limitation over of lands of inheritance (*i*), yet in case of a personal legacy,

(1) *Twaites* v. *Smith*, 1 P. Wms. 12. *Portman* v. *Willis*, Cro. Eliz. 387. *Anon*, 1 P. Wms. 267.

(2) *Hyde* v. *Parrot*, 1 P. Wms. 1. *Clarges* v. *Albermarle*, 2 Vern. 245, *Vachel* v. *Vachel*, 1 Ch. Ca. 129, 130.

right of legacies according to the rules of the common, and not of the civil law, is plain from a common case; as suppose a devise to a daughter of 1,000*l.* on condition that she marry with her mother's consent, with a devise over in case she does not marry with such consent; if the daughter does marry without her mother's consent, a court of equity determines the devise over, and the condition to be good, though the civil law says they are both void; for, by that law, maritagium debet esse liberum." See *Mackell* v. *Winter*, 3 Ves. 545.

(*i*) It is certainly true, that with respect to executory devises of terms for years, courts of equity have much inclined to lay hold of any words in the will, to tie up the generality of the expression of dying without issue, and to confine it to dying without issue living at the time of the person's death; but they have not allowed this inclination to prevail, without some restrictive circumstance in the limitation. See *Burford* v. *Lee*, 2 Freeman, 210. *Green* v. *Rod*, Fitzgibbon,

or chattel real, it is not intended to arise upon any remoter contingency, than that of

61. *Beauclerk* v. *Dormer*, 2 Atk. 308. *Saltern* v. *Saltern*, 2 Atk. 376. *Bigge* v. *Bensby*, 1 Bro. Ch. R. 187. But, "although in the limitation of a personal estate, after dying without issue, these words shall not, ex vi termini, and without the concurrence of any other circumstance of intention, signify a dying without issue then living, even though the limitation is in the nature of an estate-tail by implication only; yet, on the other hand, they shall not ex vi termini, when there is any other circumstance of intention, import an indefinite failure of issue, even though the limitation is in the nature of an express estate tail; but that, in either case if the limitation rests solely upon the usual extent and import of these words, the limitation over is too remote, and therefore void, and the whole vests in the first devisee or legatee; but that, in either case, the signification of these words may be confined to a dying without issue then living, by any clause or circumstance in the will which indicates or implies such intention." See Fearne's Ex. Dev. 371, 372. Nor are the cases referred to when examined, at variance with this position; for, in the first, *Target* v. *Gaunt*, 1 Wms. 432, the bequest was to *A.* for life, and no longer, and, after his decease, to such of *A.*'s issue as *A.* should by will appoint; and in case *A.* should die without issue, then he devised the lands over. These words were, upon the whole of the will, construed to mean issue living at his death, because it was to be intended such issue as *A.* should or might appoint the term to, *viz.* issue then living. With respect to the case of *Atkinson* v. *Hutchinson*, Mr. Fearne observes, "that though Lord Talbot seemed to admit the distinction, yet it was only by way of auxiliary argument; and he by no

dying without issue living at his death (3). So where there was a devise of all the personal estate to *A.*, who was a feme covert; but the testator declared that it was his mind that the interest and produce thereof

(3) *Targent* v. *Gannt*, 1 P. Wms. 432. *Atkinson* v. *Hutchinson*, 3 P. Wms. 258. *Pinbury* v. *Elkin*, 1 P. Wms. 563. *Goodtitle* v. *Pegden*, 2 T. Rep. 720. *Exel* v. *Wallace*, 2 Ves. 121.

means appears to have founded his opinion or decree in the case upon it, nor indeed was there any call for it; for the words there were, without issue; and in regard to which words, Lord Talbot observed, the case of *Forth* v. *Chapman* was in point, as there could be no difference between the words, without leaving issue, and leaving no issue. And it is further observable, that in *Atkinson* v. *Hutchinson*, there was a preceding limitation upon the death of any of the children, without leaving issue, to the survivors. Now this strictly was not applicable to an indefinite failure of issue, because confined to a survivor; and it was but reasonable to give the same words the same construction in the subsequent limitation, which they must bear in a limitation immediately preceding, applied to the same subject." Fearne's Ex. Dev. 367, 368. *Elton* v. *Eason*, 19 Ves. 79. And, in the case of *Pinbury* v. *Elkin*, 1 P. Wms. 563, the limitation was, that if *A.* die without issue by the testator, then, after her decease, 80*l.* should remain to the testator's brother, the words, then after, being taken to mean, immediately after, and consequently to restrain the dying without issue to the time of her death. See *Salkeld* v. *Vernon*, 1 Eden's Rep. 71, 72; see also *Elton* v. *Eason*, 19 Ves. 79, in which case the distinction taken in *Forth* v. *Chapman* is recognized, notwithstanding the doubts of Lord Kenyon in *Porter* v. *Bradley*.

should be for her use, separate from her husband; and after her decease, the interest and produce thereof to her children till twenty-one, and then the principal to them; but for want of such issue, then he gave all his estate to the children of *J. S.*, and made the said *A.* executrix and residuary legatee, she being only entitled to the interest and produce for her life, the personal estate was not vested in her; and the limitation over upon the contingency of *A.* dying without issue, is a good limitation: and as for the words *residuary legatee*, it only means for the purpose in the will.

SECTION V.

And the canonists, whom our resolutions have followed, have expounded these wills, as the civilians did the testamenta militaria, according to the intent (*k*). And, there-

(*k*) It might be inferred from this passage, that the testamentum militare was the only will which, by the civil law, was construed according to the intent; a distinction which certainly could not be supported; for, though the testamentum militare was one of the privileged descriptions of wills, its privileges were merely dispensations, with certain solemnities essential

fore, although a legacy is to be taken as a gift, yet a man shall be intended to be just before he is kind; so that a bequest of the same sum by the debtor to the creditor shall be applied in satisfaction of the debt (1). For, by the law of nature, when two duties happen to interfere at the same point of time, that which is the most honest and best is to be preferred. And so it shall be in construction; for the intendment of law is agreeable to nature, and on the better side. Yet where there are assets, and he intended both, it may be as good equity to construe him both just and kind (*l*); and the construction of making

(1) *Talbot* v. *D. of Shrewsbury*, Pre. Ch. 394. *Jeffs* v. *Wood*, 2 P. Wms. 130. *Fowler* v. *Fowler*, 3 P. Wms. 354. *Reech* v. *Kennegal*, 1 Ves. 123. *Gibson* v. *Scudamore*, Moseley, Rep. 7.

to the validity of other wills. See Inst. lib. 2. tit. 11. Vinnius in Inst. p. 309. Godolphin's Orphan's Legacy, p. 16.

(*l*) And such is the general inclination of our courts of equity; if, therefore, the testator appear, from any expression in his will, to have intended to be bountiful as well as just, his purpose shall prevail, and the general rule that a legacy, equal or greater than the debt, shall be presumed to have been intended as a satisfaction of the debt, must as a mere presumption give way to the express or clear intimation of a different intent; as where the testator creates a fund for the payment of debts, and subject thereto, charges his legacies thereon; *Chancey*'s case, 1 P. Wms. 408; *Richardson* v. *Greese*, 3 Atk. 65.; *Hinchcliffe* v. *Hinchcliffe*, 3 Ves. 529; *Barclay* v. *Wainwright*, 3 Ves. 466. That

a gift a satisfaction has in many cases been carried too far (2). And this presumption

(2) *Cuthbert* v. *Peacock*, 1 Salk. 155. *Chancey*'s case, 1 P. Wms. 410. *Eastwood* v. *Vincke*, 2 P. Wms. 616. *Tanner* v. *Soles*, MSS. July 1789. Rolls.

a legacy of a less sum than the actual debt shall not be construed a satisfaction pro tanto, see *Eastwood* v. *Vincke*, 2 P. Wms. 616. *Atkinson* v. *Webb*, 2 Vern. 478, or not equally beneficial in some particulars, though more beneficial in others, as in time of payment, *Nicholl* v. *Judson*, 2 Atk. 300. *Clark* v. *Sewell*, 3 Atk. 96. *Haynes* v. *Mico*, 1 Bro. C. R. 129; or in point of certainty, *Crompton* v. *Sale*, 2 P. Wms. 555. *Barret* v. *Beckford*, 1 Ves. 519. *Jeacock* v. *Falkener*, 1 Bro. Ch. R. 295. Or the debt be founded on a negociable instrument, *Carr* v. *Eastabroke*, 3 Ves. 563; but see *Brown* v. *Dawson*, Pre. Ch. 240. So if the debt was upon an open and running account, *Rawlins* v. *Powell*, 1 P. Wms. 299; or contracted subsequently to the date of the will, *Thomas* v. *Bennett*, 2 P. Wms. 343. But it has been held, that a legacy of a less sum than a portion or provision secured to a child by a settlement or otherwise, is a satisfaction pro tanto; see *Warren* v. *Warren*, 1 Bro. Ch. Rep. 305; 1 *Cox*'s Ca. Ch. 41; but, *quære*, whether that determination did not proceed upon its being clear of doubt in that case, that the father had forgotten the settlement; see *Hanbury* v. *Hanbury*, 2 Bro. Ch. Rep. 352. *Baugh* v. *Reed*, 3 Bro. Ch. R. 192. It may, however, be proper to remark, that Mr. Sanders, in a note to *Bellasis* v. *Uthwaite*, 1 Atk. 426, treats it as a settled point, that a legacy not so great as the portion or provision secured to a child, by a settlement or otherwise, is a satisfaction pro tanto, and has referred to several cases: but which, with the exception of the above case of *Warren* v. *Warren*, appear to me to fall rather under the head of double

of the canon law was founded upon the similitude of the legacy with the debt,

portion or revocation of legacies, than of satisfaction pro tanto; but in *Chaplin* v. *Chaplin*, 3 P. Wms. 246, there certainly is a dictum to such effect; see also Roper on Legacies, 2 Ves. 30, *Post*, c. 2. § 1. note (*a*). But whatever doubt may be entertained upon the point, whether a part satisfaction shall be intended, yet a part performance of a covenant may be presumed; as where *A*. covenants to settle lands of a certain value, and purchases land of less value, which he allows to descend, such purchase shall be inferred to have been in part performance of his covenant; *Lechmere* v. *Lord Carlisle*, 3 P. Wms. 211. *Wilcocks* v. *Wilcocks*, 2 Vern. 558. *Wilson* v. *Pigott*, 2 Ves. jun. 356. As to the performance of covenants by a devolution of interest more beneficial to the covenantee, see *Blandy* v. *Widmore*, 1 P. Wms. 324. *Edwards* v. *Freeman*, 2 P. Wms. 443; see *D'Arcanda*, 3 Atk. 419; see also *Kirkman* v. *Kirkman*, 2 Bro. Ch. Rep. 95; *Rickman* v. *Morgan*, 2 Bro. Ch. Rep. 394. *Twisden* v. *Twisden*, Ch. 28 Feb. 1804. *Garthshore* v. *Chalie*, 10 Ves. 12. As to satisfaction by devise of a residue, see *Johnson* v. *Smith*. 1 Ves. 314. *Alleyn* v. *Alleyn*, 2 Ves. 37. *Richman* v. *Morgan*, 1 Bro. C. R. 63. 2 Bro. C. Ch. 388. *Freemantle* v. *Bankes*, 5 Ves. 79. And as to the satisfaction of portions or provisions for children, by a legacy of greater or equal amount, see *Hinchcliffe* v. *Hinchcliffe*, 3 Ves. 516. *Sparkes* v. *Cator*, 3 Ves. 530, where the subject is very fully and most ably considered, and where, amongst other points, it is determined, that slight circumstances of difference, which, as between strangers, would repel the presumption of satisfaction, are not sufficient as between parent and child, (see also *Moulson* v. *Moulson*, 1 Bro. Ch. Rep. 82.) and that when a legacy has been

which yet might be controlled by opposite presumption. Much more then ought

decreed to be a satisfaction, it must be grounded upon some express evidence, or, at least, strong presumption, that the testator intended it as such; see *Clark* v. *Sewell*, 3 Atk. 96; *Haynes* v. *Mico*, 1 Bro. C. R. 129; see *Tolson* v. *Collins*, 4 Ves. 483. As to the admission of parol evidence, see *Hayues* v. *Mico*, 1 Bro. Ch. R. 129. *Fowler* v. *Fowler*, 3 P. Wms. 353. *Freemantle* v. *Bankes*, 5 Ves. 79.

Having considered in what cases a legacy shall be esteemed as a satisfaction of an actual debt, due from, or of a covenant entered into by the testator, it may be proper to consider in what cases a devisee or legatee, claiming under and also against the will, shall be put to his election. "A man (Lord Chief Justice de Grey remarks, in his judgment in *Pulteney* v. *Lord Darlington*) may give by a mean and indirectly what is not his own, either by express condition or equity arising upon an implied condition." "Where the testator has neglected, probably from ignorance, possibly from inattention to the nature of the estate, to insert such a condition, then a court of equity interposes." If the condition be express, "it must be performed as framed; and if it is not, that will induce a forfeiture: but the equity of the court is to sequester the devised interest quousque, till satisfaction is made to the disappointed devisee." This being the purpose for which courts of equity interpose, it follows that wherever a testator has, by his will, disposed of the estate of another, to whom he has also, by his will, given other property, whether immediately, or remotely, or contingently, whether of value or not of value, real or personal; the party shall not be permitted to enjoy any benefit under the will, without relinquishing his claim against it, but shall be

proofs to do it, which may be stronger than any presumption. So if a legacy be less

put to his election; and if such devisee or legatee labour under any disability, as infancy or coverture, the court will refer it to a master to inquire, whether it will be most beneficial for the party to take under or against the will, and decree accordingly; see *Noys* v. *Mordaunt*, 2 Vern. 580. *Streatfield* v. *Streatfield*, Forrest. 176. *Arnold* v. *Kempstead*, Ambl. 466, 2 Eden's Rep. 236. *Jones* v. *Collier*, Ambl. 730. *Villereal* v. *Lord Galway*, Ambl. 682. *Cookes* v. *Hellier*, 1 Ves. 234. *Lewis* v. *King*, 2 Bro. Ch. Rep. 600. *Pulteney* v. *Ld. Darlington*, 1 Bro. Ch. Rep. 226. *Rutter* v. *Meclean*, 4 Ves. 531. *French* v. *Davies*, 2 Ves. 572; 1 Bro. C. R. 480, 514, 534. *Wilson* v. *Mount*, 3 Ves. 191; 5 Ves. 515; 9 Ves. 533. *Foster* v. *Cook*, 3 Bro. 347. *Finch* v. *Finch*, 4 Bro. Ch. Rep. 38. *Lady Cavan* v. *Pulteney*, 2 Ves. jun. 544. But see *Cull* v. *Showell*, Ambl. 727. *Forrester* v. *Cotton*, Ambl. 388, 1 Eden. 532. *Rumbold* v. *Rumbold*, 3 Ves. 65. See also *Wilson* v. *Lord John Townshend*, 2 Ves. jun. 693. in which case the legacy to the wife was to her separate use, which making her a feme sole in equity was relied upon at bar, as materially distinguishing it from all the other cases upon the subject, but the court over-ruled the distinction. A clear knowledge of the funds being requisite to election, no person shall be bound to elect without such previous knowledge; *Whistler* v. *Webster*, 2 Ves. jun. 371. *Soden* v. *Soden*, March 1806, Ch. But though the party is entitled to a knowledge of the funds, yet such right does not exist until the whole of the testator's affairs are wound up, as held in the case of *Lord Beaulieu* v. *Lord Cardigan*, Ambl. 535. See *Butricke* v. *Broadhurst*, 1 Ves. 171; 3 Bro. 273; 1 Ves. 335; 14 Ves. 341. *E. of Northumberland* v. *Marquis of Granby*, 1 Eden's Rep. 500. As to what shall be con-

than the debt, it was never held to go in satisfaction (3). So if the legacy were upon condition, or upon a contingency; for the will is intended for his benefit, and therefore it could not be supposed that the testator would give him an uncertain recompence in satisfaction of a certain demand (4). So if the thing were of a different nature, as land, it should not go in satisfaction of money, unless there was a defect of assets (5). So if the debt was contracted after the legacy given (6), he could not have it in contemplation to satisfy a debt not then in being (7). Cases of this nature, therefore, depend upon circumstances; and where a legacy has been decreed to go

(3) *Cranmer's* case, 2 Salk. 508. *Talbot* v. *Earl of Shrewsbury*, Pre. Ch. 394. *Eastwood* v. *Vincke*, 2 P. Wms. 616. *Atkinson* v. *Webb*, 2 Vern. 478. *Minuel* v. *Sarazine*, Mosely, 295. (4) *Talbot* v. *Duke of Shrewsbury*, Pre. Ch. 394. *Cranmer's* case, 2 Salk. 508. *Nicholls* v. *Judson*, 2 Atk. 300. *Crompton* v. *Sale*, 2 P. Wms. 555. *Barrett* v. *Beckford*, 1 Ves. 519. *Spink* v. *Robins*, 2 Atk. 491. *Bellasis* v. *Uthwaite*, 1 Atk. 426. (5) *Eastwood* v. *Vincke*, 2 P. Wms. 616. *Cranmer's* case, 2 Salk. 508. *Chaplin* v. *Chaplin*, 3 P. Wms. 245. *Stanway* v. *Stiles*, 2 Eq. Ca. Ab. Devises, pl. 21. and see 4 Ba. Ab. 369. Gwillim's ed. (6) *Fowler* v. *Fowler*, 3 P. Wms. 354. (7) *Cranmer's* case, 2 Salk. 508. *Thomas* v. *Bennett*, 2 P. Wms. 341. *Chancey's*, case, 1 P. Wms. 409. *Fowler* v. *Fowler*, 3 P. Wms. 353.

strued an election, see *Unett* v. *Wilkes*, 2 Eden's Rep. 187. *Green* v. *Green*, 2 Merrivale, 86. See *Ward* v. *Baugh*, 4 Ves. 623; that where persons are entitled in succession, they are severally entitled to elect. That executors may elect the testator, not having elected, see *Banner* v. *Low*, Ch. M. T. 1806. Whether evidence dehors the will is admissible to raise the question of election, see *Hinchcliffe* v. *Hinchcliffe*, 3 Ves. 516. *Pole* v. *Lord Somers*, 6 Ves. 309. *Judd* v. *Pratt*, 13 Ves. 178. *Druce* v. *Denison*, 6 Ves. 385. As to what shall be

in satisfaction of a debt, it must be grounded upon some evidence, or at least a strong presumption, that the testator did so intend it; for a court of equity ought not to hinder a man from disposing of his own as he pleases (*m*). And therefore, the intention (8) of the party is to be the rule; for, where he says he gives a legacy, we cannot contradict him, and say he pays a debt.

(8) *Cranmer's case*, 2 Salk. 508.

construed a devise, that a testator was not authorised to make, so as to put the devisee to his election, see *Doe* v. *Oxendon*, 3 Taunt. 147.

(*m*) As to what shall be construed a release of a debt, see *Aston* v. *Pye*, in a note to *Smith* v. *Eden*, 5 Ves. 350.

SECTION VI.

But, as the whole force of the bequest (*n*) often rests upon some particular words, it will be necessary to consider what interpretation they bear in the canon and civil law; at least such as are made use of frequently in testaments, as goods, chattels, moveables, ready money, debts, household-stuff, and

(*n*) That a legacy may be implied, see *Crowder* v. *Clowes*, 2 Ves. jun. 441. *Wainewright* v. *Wainewright*, 3 Ves. 558. *Ramsden* v. *Hassard*, 3 Bro. 236.

the like. Now, by goods, the civil law doth oftentimes understand, not only those things whereof a man is owner, or justly possessed, but also such as belong to him, whether corporeal or incorporeal, for the which he may have a lawful action, as debts (1). And so with us, the words goods and chattels, in a devise, will pass a right to set aside a release obtained by fraud (*o*). 2dly, Sometimes it is understood of a man's whole estate, both actively and passively, which devolves upon him, who, in that law, is

(1) Swinburne, part 7. s. 10. p. 475. 486. 5th ed. *Duhamel* v. *Ardovin*, 2 Ves. 163. *Crichton* v. *Symes*, 3 Atk. 63.

(*o*) That a devise of all the testator's goods will pass a bond, see *Anon.* 1 P. Wms. 267; *Ryall* v. *Rolle*, 1 Atk. 180, 182, unless there be some words in the will indicative of an intent to the contrary, as in *Woolcomb* v. *Woolcomb*, 3 P. Wms. 112, note (1), Cox's ed. See *Fleming* v. *Brook*, 1 Sol. & Lef. 318. But bonds, as a species of choses in action, not admitting of locality as money does, will not pass under a bequest of goods and chattels in a particular place; *Chapman* v. *Hart*, 1 Ves. 271; *Moore* v. *Moore*, 1 Bro. Ch. Rep. 127. See also *Green* v. *Symond*, 27th February 1730. Mr. Brown's Appendix, p. 6; *Jones* v. *Sefton*, 4 Ves. 166. Neither will debts due by bond pass by a bequest of all the testator's moveable goods; *Sparke* v. *Denne*, Sir W. Jones, 225. That a lease will pass by a bequest of all the testator's goods, see *Portman* v. *Willis*, Cro. Eliz. 387. But see *Godolphin*, 392, 7. Swinburne, part 7. s. 10. That the testator's interest under a subsequent renewal of a lease will not pass under a bequest of leasehold premises, "and all my estate, term, and interest therein."

called hæres, or heir (2). 3dly, By the word goods, the same law doth understand no more, but only a man's clear goods, his debts deducted (2). And, in the common law (*p*), the word goods extends neither to things in action, (3), nor chattels (4), nor freehold (5).

(2) 2 Swinburne, part 7. s. 10. p. 475.

(3) *Calye's* case, Rep. 33.

(4) *Portman* v. *Willis*, Cro. Eliz. 387.

(5) *Calye's* case, 8 Rep. 33.

see *Slatter* v. *Noton*, 16 Ves. 197; *Abney* v. *Miller*, 2 Atk. 593.

(*p*) That specialties, debts, leases, &c. have been held, in the construction of wills, to pass by the word goods, must therefore be referred to the rules of the civil and canon law, being allowed to govern the construction of wills of personal estate. See *Portman* v. *Willis*, Cro. Eliz. 387. *Anon.* 1 P. Wms. 267; *Moore* v. *Moore*, 1 Bro. Ch. Rep. 127.

SECTION VII.

CHATTELS is a word more obvious in the laws of this realm than in the civil law, and takes in all his goods, except such as are of the nature of freehold, or parcel thereof (1). And these chattels are divided into real or immoveable (*q*), and personal or

(1) 1 Swinburne, part 7. s. 10. p. 475. Co. Litt. 118, b.

(*q*) "Chattels real (saith Sir Edward Coke) are such as concern the reality, as terms of years, the interest

moveable (*r*). Among the latter, money is accounted, though some have held, that ready money is neither goods nor chattels, because it is of no worth in itself, but is made so only by the consent of men, as necessary for common life; but, according to others, a devise of all his chattels passes the whole estate of the testator, both actively and passively, as in case of a devise of all his goods (*s*); for it is as extensive, and more (2).

(2) Swinburne, part 7, s. 10. p. 477.

of tenant, by statute staple, by statute merchant, by elegit, and such like. 1 Inst. 118, b. And these are called real chattels, as being interests issuing out of or annexed to real estates; of which they have one quality, *viz.* immobility, which denominates them real; but want the other, *viz.* a sufficient legal indeterminate duration; and this want it is that constitutes them chattels." See 2 Bla. Com. 386. As to leases for years passing by general words, see *Rose* v. *Bartlett*, Cro. Car. 292; *Lane* v. *Earl of Stanhope*, 6 Term Rep. 652; *Lowther* v. *Cavendish*, 1 Eden's R. 109; 6 Ves. 640; *Whitaker* v. *Ambler*, 1 Eden's Rep. 151; *Hartley* v. *Hurle*, 5 Ves. 540. See also 5 Ves. 476.

(*r*) Chattels personal are properly things moveable, which may be annexed to or attendant upon the person of the owner, and carried about with him from one place to another: such are animals, household-stuff, &c. Co. Lit. 118, b.

(*s*) That the whole of the testator's personal estate, and consequently his money, will, by the civil law,

pass by a general bequest of all his goods, or of all his chattels, is established by the authorities referred to in Swinburne, part 7, § 8; and the case which seems to break in upon this position will be found to have proceeded on the particular language of the bequest. In the *Anon.* case, in Pre. Ch. 8, the testator bequeathed his wife 1,200*l.* in money, and all the goods and chattels, &c. in and belonging to his house in *N.* in which house there was 400*l.* in money; and the question was, whether this 400*l.* should pass by the will? The court held it should not; for 400*l.* is a considerable sum, and the testator could not be supposed to be ignorant of its being in the house: therefore, had he intended to pass it, he would not have couched it under general words, but would at first have given his wife 1,600*l.* In the case of *Woolcomb* v. *Woolcomb,* 3 P. Wms. 112, the bequest was, of all the testator's household goods, and other goods; and there was also a bequest of the residue; which bequest of the residue would have been frustrated, had the words "other goods" been held to carry all the personal estate. The court, therefore, held that such words "other goods" must be intended to signify things of the like nature with household goods. So in *Trafford* v. *Berridge,* 1 Eq. Ca. Ab. 201. pl. 14. See also *Cook* v. *Oakley,* 1 P. Wms. 302; *Timewell* v. *Perkins,* 2 Atk. 103; *Boon* v. *Cornforth,* 2 Ves. 279; *Cavendish* v. *Cavendish,* 1 Bro. Ch. Rep. 467; where this rule is recognised, *viz,* that things to pass under general words must be ejusdem generis with those expressly devised; see also *Stuart* v. *The Marquis of Bute,* 11 Ves. 666. *Hotham* v. *Sutton,* 15 Ves. 319. But if there be nothing in the will indicative of an intention to restrict the general import of the words "goods and chattels," money, if not an extraordinary sum, and just received, will pass. See *Chapman* v. *Hart,* 1 Ves. 273.

SECTION VIII.

MOBILIA is strictly such goods as are passively moveable or removable; and moventia, such as actively, and by their own accord, do move themselves, as live goods. Yet regularly moveables are indifferently understood of both, and will pass them in a devise; as also industrial fruits, viz. such as are sown by men's industry, in order to be reaped with increase ere long; for these are moveable habitu, or in the intention and purpose of the sower. And these emblements are to be put in the inventory (1); for the rule of accessorium sequitur principale is true in fruits natural (*t*)

(1) Swinburne, part 7. s. 10. p. 478, 479.

(*t*) "By natural fruits are intended such as grow spontaneously, without any great labour or cost, as grass or apples, &c. and these the legatee cannot recover as moveable, unless they were separated at the time of the testator's death; for, till they are separated, they are accounted not only as annexed to the ground or trees whereon they grow, but are also reputed as part and parcel of the body whereon they grow, and whence they are nourished, and consequently of the same nature and condition, namely immoveable." Swinb. part 7. s. 10, p. 478, 479.

but not in fruits industrial. Immoveable goods, or chattels real (*u*), are those which do not immediately belong to the person, but to some other thing by way of dependency; as trees growing, or a term for years. Yet it will not extend to the industrial fruits, for they are reckoned among the moveable; but it takes in all leases; and all the natural fruits; as also whatever is appurtenant to, or parcel of the thing devised, which, if it were out of lease, should belong to the heir, and not to the executor (2).

(2) Swinburne, part 7, s. 10. p. 480.

(*u*) As chattels real pass as immoveables, so chattels personal pass as moveables. See Godolphin's Orph. Leg. part 3. ch. 20. s. 2. *Knotsford* v. *Gardiner*, 2 Atk. 451. *Ex parte Caswall*, 1 Atk. 560.

SECTION IX.

READY money is justly reputed among the moveable goods of the deceased (*x*); for no goods are more moveable, and it is

(*x*) And will, therefore, in general, pass under the description of moveables. But see Godolphin's Orph. Leg. part 3. ch. 21. s. 9; where several other cases are stated, which, it is contended, are not within the general rule.

therefore termed current. But although this is regularly true, yet it fails in particular cases. As, 1st, of the money that arises from lands devised to be sold, vide 21 H. VIII. c. 5. 2dly, Of money laid up for payment of lands purchased; for it is not likely that he intended to pass that money in prejudice to the heir, according to that rule of law, that nothing doth pass by general words, where it is likely the giver would not grant them by special. Also in favour of the heir, many things, which of their own nature are moveable, by construction or fiction of law are nevertheless accounted immoveable, as hawks and hounds, and deer in the park (1), &c.

(1) Swinburne, part 7, s. 10. p. 479, 480. Godolphin's Orph. Leg. part 3. c. 21. s. 12.

SECTION X.

DEBTS are neither moveable nor immoveable goods, nor will they pass as such (*y*).

(*y*) This point seems to be still vexata questio among the civilians. Swinburne has brought together the reasoning for and against it, and seems to prefer the opinion of those who deny that, by the civil law, debts will pass by the description of goods moveable or im

But if the testator did bequeath all his goods moveable and immoveable whatsoever; these universal signs stretch the word to which they are joined, to the comprehension of whatsoever is signified by them, not only properly, but also improperly, or else they would be idle and superfluous; which superfluity is to be avoided, especially in a testament, wherein commonly less is written than spoken, and less spoken than was meant, partly through want of skill, and partly through want of time. And although no man is presumed to think that which he doth not speak, yet, by the common use of speech within this realm, debts are understood to be comprehended under that general legacy of all goods moveable and immoveable.

moveable. See part 7. § 10. p. 481, 482, 483. See also Wentworth's Office of Executor, 250; *Sparke* v. *Denne*, Sir W. Jones, 225. *Lee* v. *Hale*, 1 Ch. Ca. 16. 1 P. Wms. 267.

SECTION XI.

HOUSEHOLD stuff is instrumentum patrisfamilias domesticum et quotidianum (1). But this wants some further explanation

(1) Dig. lib. 33 tit. 10. de supellectile legatas.

In the first place, then, there is no doubt but these particulars are to be reckoned as part and parcel of household stuff,' viz. tables, stools, chairs, carpets, hangings, beds, bedding, basons, with ewers, candlesticks, all sorts of vessels serving for meat and drink, being of earth, wood, glass, brass, or pewter, pots, pans, spits, and such like. 2dly, Without all difficulty, apparel, books, weapons, tools for artificers, cattle, victuals, corn in the barn or granary, wains, carts, plough-gear, vessels affixed to the freehold are no part of household stuff (2). And in ancient times, nothing which was made of silver or gold was accounted household stuff; because of the severity and frugality of old times, when vessels of gold and silver were very rare. But upon the change of manners, ex ebore, testitudine atque argento, jam ex auro etiam atque gemmis supellectili utimur. And thus also these vessels of silver, gold, and precious stones as bason and ewer, bowls, cups, candlesticks, &c. pass as part of household stuff or furniture. Yet not indistinctly or absolutely, but with this limitation, so that it be agreeable to the testator's meaning, otherwise not; that is, if the testator, in his life-time, did use to reckon them amongst his household stuff; but if the testator did esteem

(2) Swinburne, part 7. § 10. p. 484, 485. Godolphin's Orph. Leg. part 3. c. 20. § 12.

them as ornaments, rather than utensils, and did use them for pomp or delicacy, rather than for daily or ordinary service of his house, in this case they do not pass under the bequest of household stuff (*a*). Or if the testator did use to number things of another kind amongst his household stuff, which, without doubt, are not so to be esteemed as his apparel, and such like; then, although he did intend that his apparel or those things should pass under the name of household stuff, yet the legatory cannot recover them (3). So furniture (*b*)

(3) Swinburne, part 7. § 10. p. 485, 486.

(*a*) Whether, by the rule of the civil law, plate would pass as household stuff, is a question upon which civilians differ; but in courts of equity, though it was formerly held that plate would not pass by a bequest of all testator's household goods, (*Jesson* v. *Essington*, Pre. Ch. 207,) yet it seems now to be settled, that it will, if it appear that the testator was in the habit of using plate, or was of a rank in life which rendered plate an article suitable to his domestic establishment. *Lilcot* v. *Compton*, 2 Vern. 638; *Masters* v. *Masters*, 1 P. Wms. 425; *Nichols* v. *Osborn*, 2 P. Wms. 419; *Snelson* v. *Corbet*, 3 Atk. 369; *Kelly* v. *Pawlett*, Ambl. Rep. 605. It is scarcely necessary to observe, that the rule does not extend to articles of furniture or plate bought or made by the testator in the way of trade. See Ambl. Rep. 611. *Le Farrant* v. *Spencer*, 1 Ves. 97.

(*b*) That a library will not pass under the description of furniture, see *Bridgeman* v. *Dove*, 3 Atk. 202. *Kelly*

in a large house takes in plate; but not where he distinguishes the chapel plate from the furniture (4).

(4) *Franklin* v. *E. of Burlington*, Pre. Ch. 251. 2 Vern. 512.

v. *Powlett*, Ambl. 605. That books or wine will not, see *Porter* v. *Tunney*, 3 Ves. 311. As to what will pass under the description of effects, see 15 Ves. 507.

SECTION XII.

And although there be no defect in the testator's meaning, yet because the same is no way expressed by words, which, by their own nature, or by common use of speech, might testify this meaning of the testator, therefore is the legacy void, as if it had not been written or spoken; unless it were the express will of the testator that the legacy should stand good notwithstanding his misnaming thereof (1). Non enim ex opinione singulorum, sed ex communi usu verba exaudiri debent. But it is to be observed, that error in the name, quantity,

(1) Swinburne, part 7. § 5. p. 460.

or quality of the thing bequeathed (*c*) doth not hurt the legacy, when the body or substance is certain; and so of error in the name (*d*) or quality of the person (*e*). But error in the body or substance of the thing bequeathed doth destroy the legacy, as well as in the person of the executor or legatory (2). And so error in the form of the disposition maketh it to be of no force; as

(2) Godolph. p. 3. c. 25. § 10. Swinb. part 7. § 5. p. 460.

(*c*) By this must be understood error in the proper name, and not in the name appellative; as if the testator, intending to devise Black-acre, devise Green-acre, having no such land, the error is not in the substance, but only in the proper name of the thing intending to be devised, and therefore the legacy shall take effect. But if the testator, intending to bequeath a horse, bequeath a house, not having a house, the error in the substance of the thing will disappoint the legacy. There are circumstances, however, which will prevent error in the name appellative avoiding a legacy. See Swinb. part 7. § 5. p. 460.

(*d*) In what cases error in the name of the legatee or executor will affect the appointment or legacy; see Swinb. part 7. § 5. *Delmare* v. *Rabello*, 3 Bro. Ch. Rep. 446, and cases there cited. *Smith* v. *Coney*, 6 Ves. 42. *Thomas* v. *Thomas*, 6 Term R. 671. B. 1. c. 2. § 7. note (*v*).

(*e*) Unless the quality of the executor or legatee be the cause assigned of the testator's appointing him executor or legatee. Swinb. part 7. § 5.

(3) Swinburne, part 7. § 5. p. 462.

if a condition is omitted by mistake (*f*) the legacy is void (3).

(*f*) But if the testator appoint an executor, or bequeath any legacy, according to certain conditions afterwards to be written, the disposition is good, as if it were made without condition, unless it appear that the testator mean that the disposition should not take place without some condition. Swinburne, part 7. § 5. p. 462.

SECTION XIII.

And a will speaks not until the death of the party, for till then he is master of his own will; but the construction is to be made, as matters stood at the time of making the will (*g*). As where *A.* devised the sur-

(*g*) There certainly are bequests which, in order to effectuate the intent, may be construed with reference to the time of the testator's making his will; as where the testator gives a specific thing as being then in his possession, and which, in its nature, is not fluctuating, and he gives it by a particular qualified, and not a collective, appellation; as the leases which he now has, *Slatter* v. *Noton*, 16 Ves. 197. *Abney* v. *Miller*, 2 Atk. 593; or all the horses now in his stable, or the arrears of an annuity now due; in which cases subsequent leases, or

plus of his estate to his brothers, *B. C.* and *D.* and the children of his brother *E.* and of his sister *F.* equally to be divided; and if any of my brothers die before the estate is got in and divided, his or their share to go to his or their children. *B.* died before the estate was got in and divided, and before

after purchased horses, or arrears afterwards accrued due, will not pass; 1 P. Wms. 597; *Attorney General* v. *Bury*, 1 Eq. Ca. Ab. 201. See also *Baugh* v. *Read*, 1 Ves. jun. 260. But these cases are to be referred to the particular expression of the bequest; for though a bequest of a specific thing then in the testator's possession, by a particular, and not a collective description, will not pass things ejusdem generis acquired by the testator after the making of his will; yet if the bequest be of a thing in its nature fluctuating, as a flock of sheep, or by a collective term, as library, sheep afterwards produced, and books, afterwards purchased, will pass; *All Souls College* v. *Codrington*, 1 P. Wms. 597; *Dean of Christchurch* v. *Barrow*, Ambl. 641.

It may also be necessary, in some cases, to refer to the time of the testator's making his will, in order to ascertain the objects of his bounty; as in a devise to all his children or grandchildren, without any reference to his death, or time future, such devise is held, primâ facie, to refer only to such children and grandchildren as were living at the time of the testator's making his will; *Northey* v. *Strange*, 1 P. Wms. 342. Pre. Ch. 470; but see *Roberts* v. *Higman*, 12th July 1779. 1 Bro. Ch. Rep. 532, note. *Sherer* v. *Bishop*, 4 Bro. Ch. Rep. 55.

the testator, yet still he died before the estate was got in and divided. But then it is objected, that his share is to go to his children, when he had no share ever vested in him; but that it is to be understood the share intended him. So a devise of 300 *l.* to three at twenty-one, and, if any die, to go to the survivors; one died in the life of the testator; this devise over is good (1).

(1) *Perkins* v. *Micklethwaite*, 1 P. Wms. 274. *Ledsome* v. *Hickman*, 2 Vern. 611. *Miller* v. *Warren*, 2 Vern. 207. *Willing* v. *Baine*, 3 P. Wms. 113. *Scoolding* v. *Green*, Pre. Ch. 37. *Hornsby* v. *Hornsby*, Mosely's Rep. 319.

SECTION XIV.

And if the gift be general, it shall be expounded generally (*h*), for the court will not

(*h*) Where the court in the construction of a will, restricts the generality of the bequest, it is because the bequest would otherwise fail, from the uncertainty and generality of its expression; as where the bequest is to the relations, or the poor relations, (see *A. G.* v. *Price*, 17 Ves. 573,) of the testator, or to the relations of *A.* the extent and comprehension of the description, (though it does not include those by marriage, *Maitland* v. *Adair*, 3 Ves. 231), would wholly defeat the bequest;

restrain the testator's bounty. As where one gave legacies of 15*l.* a-piece to each of his

for it were endless to inquire for the most distant relations; it is therefore restricted to such as in the case of an intestacy would be entitled under the statute of distributions; *Roach* v. *Hammond*, Pre. Ch. 401; *Carr* v. *Bedford*, 2 Ch. Rep. 77. *Anon.* 1 P. Wms. 326; *Thomas* v. *Hole*, Forrest. 251; *Harding* v. *Glynn*, 1 Atk. 469; *Edge* v. *Salisbury*, Ambl. 70; *Whithorn* v. *Harris*, 2 Ves. 527; *Isaac* v. *Defriez*, Ambl. 595; (as to the inaccuracy of this report, see 17 Ves. 373.) *Widmore* v. *Woodroffe*, Ambl. 636; *Green* v. *Howard*, 1 Bro. Ch. Rep. 31; *Hands* v. *Hands*, cited 3 Bro. Ch. Rep. 69; *Rayner* v. *Mowbray*, 3 Bro. Ch. Rep. 234; but see *Supple* v. *Lawson*, Ambl. 729. *Bennett* v. *Honywood*, Ambl. 708. *Brunsden* v. *Woolredge*, Ambl. 507. *Greenwood* v. *Greenwood*, 1 Bro. C. R. 30, note. But a bequest to the testator's descendants, or to the descendants of *A.* does not create the necessity of referring to the statute of distributions, for such descendants are capable of being ascertained; *Crossly* v. *Clare*, Ambl. 397; *Butler* v. *Stratton*, 3 Bro. Ch. Rep. 367. So if the legacy be to the issue of *A.* the word issue being sufficient to include all the descendants, *Davenport* v. *Hanbury*, 3 Ves. 257. And in those cases in which the court does resort to the statute of distributions for the purpose of limiting the objects of the bequests to relations, it does not consider itself bound, in the distribution of the fund, to adopt the proportions prescribed by the statute; but will distribute it per capita, and in such shares as any particular expression of the bequest may call for; *Carr* v. *Bedford*, 2 Ch. Rep. 77; *Griffith* v. *Jones*, 2 Ch. Rep. 179; *Thomas* v. *Hole*, Forrest. 251; *Green* v. *Howard*, 1 Bro. Ch. Rep. 31. *Walker* v. *Shore*,

(1) *Jones* v. *Beale*, 2 Vern. 381.

relations of his father and mother's side (1): The court would not restrain the devise to

15 Ves. 122. With respect to a bequest to the children of *A.* generally, it seems settled that it shall not extend to children not in being at the time of the testator's death; *Devisme* v. *Mellor*, 1 Bro. 537; *Middleton* v. *Messenger*, 5 Ves. 136. *Roberts* v. *Higman*, 1 Bro. C. R. 532, note. *Singleton* v. *Gilbert*, 1 Cox's R. 68. But a child in ventre sa mere, shall take; *Clarke* v. *Blake*, 2 Ves. jun. 673; nor if the fund be distributable when the eldest child shall attain a certain age, shall it extend to children born after such period; *Heathe* v. *Heathe*, 2 Atk. 121; *Ellison* v. *Airey*, 1 Ves. 111; *Horsley* v. *Chaloner*, 2 Ves. 83; *Singleton* v. *Singleton*, 1 Bro. Ch. Rep. 542, note; *Hughes* v. *Hughes*, 3 Bro. Ch. Rep. 352; *Viner* v. *Francis*, 2 Bro. Ch. Rep. 658. *Hill* v. *Chapman*, 1 Ves. jun. 407; *Hoste* v. *Pratt*, 3 Ves. 730; unless there be a prior bequest of the fund or thing for the life of another, in which case all the children born in the life-time of tenant for life will take; *Ellison* v. *Airy*, 1 Ves. 111; *Godwyn* v. *Godwyn*, 1 Ves. 226; *Bartlett* v. *Hollister*, Ambl. Rep. 334; *Ayton* v. *Ayton*, 1 Bro. Ch. Rep. 542, note; or unless the time of payment is postponed until a future period; *Congreve* v. *Congreve*, 1 Bro. Ch. Rep. 531; *Andrews* v. *Partington*, 3 Bro. Ch. Rep. 402; *Gilmore* v. *Severn*, 1 Bro. C. R. 582; *Prescott* v. *Long*, 2 Ves. 690; 5 Ves. 335; 6 Ves. 345; 10 Ves. 152. *Godfrey* v. *Davis*, 6 Ves. 43. *Marshall* v. *Bousfield*, 2 Mad. 166; or unless *A.* whose children are to take, has no child living at the time of testator's death; *Haughton* v. *Harrison*, 2 Atk. 329; or *A.* having one child only, the bequest be to his children, with a clause of survivorship; *Maddison* v. *Andrews*, 1 Ves. 57; or having two, with a limitation to

the relations, within the statute of distributions. So where a will was made in these words. Item, I give to such of my servants as shall be living with me at the time of my death one year's wages. Although stewards

the survivors or survivor, *Gilmore* v. *Severn*, 1 Bro. 582. For the general rule is, that " the Court will go as far as it can to comprehend every one, until one attain the period at which that one can take a share." *Whitbread* v. *Lord St. John*, 10 Ves. 156. *Hutcheson* v. *Jones*, 2 Madd. Rep. 129. That a child in ventre sa mere shall be included in a bequest to children living at the testator's death, see *Clarke* v. *Blake*, 2 Ves. jun. 673; but see contra, *Pierson* v. *Garnett*, 2 Bro. Ch. Rep. 38; *Cooper* v. *Forbes*, 2 Bro. Ch. Rep. 63: *Bennett* v. *Honywood*, Ambl. 708; *Freemantle* v. *Freemantle*, 1 Cox's R. 248; see also *Heathe* v. *Heathe*, 2 Atk. 122, Sanders' ed. where the cases are collected and classed. That it does not generally include illegitimate children, see *Bell* v. *Phyn*, 7 Ves. 459; *Wilkinson* v. *Adam*, 1 Ves. & B. 423. That a bequest to " my children," by an unmarried man, will take effect in favour of illegitimate children living, and that parol evidence, is in such case admissible, see *Beachcroft* v. *Beachcroft*, 1 Madd. R. 431. As to after-born illegitimate children, see *Gordon* v. *Gordon*, 1 Meriv. 141; *Earle* v. *Wilson*, 17. Ves. 523. That grandchildren are not included in a bequest to children, unless from necessity, see *Radcliffe* v. *Buckley*, 10 Ves. 195, 4 Ves. 698; *Hussey* v. *Berkeley*, 2 Eden's Rep. 196; *Davenport* v. *Hanbury*, 3 Ves. 257. 383. 421. As to bequest to grandchildren, see 3 Ch. Rep. 48; Ambl. 555. 681. As to bequest to younger children, see 2 Ves. 210; 10 Ves. 177. When grandchildren shall take under the description of children, see 4 Ves. 437. 692; 10 Ves. 795.

of courts, and such who are obliged to spend their whole time with their master, but may also serve any other master, are not servants within the intention of the will, yet the court will not narrow it to such servants only as lived in the testator's house, or had diet from him (2).

(2) *Townsend v. Windham*, 2 Vern. 546. But see *Chilcot* v. *Bromley*, 12 Ves. 114.

CHAP II.

How Legacies may be destroyed or lost.

SECTION I.

LET us now see how a legacy, which was at first good, may afterwards be destroyed or lost; and this is, 1st, by ademption, or translation; 2dly, where it is lapsed; 3dly, the testator's estate falling short. Ademption is the taking away of a legacy before bequeathed (1); translation is a bestowing the legacy before bequeathed upon some other person (2): so that ademption may be without translation, but translation of a legacy cannot be without ademption. This ademption of legacies is two-fold, expressed and implied. The expressed is, when the testator doth by words take away the legacy before given. An implied ademption is when the testator doth, by deed without words take away the legacy (*a*). But ademption of

(1) Swinburne, part 7. § 20. Godolph. part 3. c. 25. § 23.

(2) Swinburne, part 7. § 21.

(*a*) Where a father, or one standing in loco parentis, makes a provision for a child by his will, and afterwards

legacies is no more to be presumed, than the revocation of the testament, unless it be

gives to such child, being a daughter, a portion in marriage, or being a son, a sum of money to establish him in life, (such portion or sum being of equal or greater amount than the legacy,) it is an implied ademption of the legacy; for the law will not intend that the father designed two portions to one child; *Hartop* v. *Whitmore*, 1 P. Wms. 680; *Blois* v. *Blois*, 2 Ch. Rep. 85; *Jenkins* v. *Powell*, 2 Vern. 115; *Jesson* v. *Jesson*, 2 Vern. 257; *Farnham* v. *Phillips*, 2 Atk. 216; *Watson* v. *Earl of Lincoln*, Amb. 325: *Ellison* v. *Cookson*, 2 Bro. Ch. Rep. 307; as to a natural child, see *ex parte Payne*, 18 Ves. 140; but this implication will not arise, if the provision by the will be by bequest of the residue; *Farnham* v. *Phillips*, 2 Atk. 216; *Smith* v. *Strong*, 4 Bro. Rep. 493; *Freemantle* v. *Bankes*, 5 Ves. 79; or if the provision in the father's life-time be subject to a contingency; *Spinks* v. *Robins*, 2 Atk. 491; *Devese* v. *Pontet*, 1 Cox's R. 188, or be not ejusdem generis with the legacy; *Grave* v. *Earl of Salisbury*, 1 Bro. Ch. Rep. 425; *Holmes* v. *Holmes*, 1 Cox's R. 39; or if the testator be a stranger; *Shudall* v. *Jekyll*, 2 Atk. 516; *Powell* v. *Cleaver*, 2 Bro. Ch. Rep. 499; *Brown* v. *Peck*, 1 Eden's Rep. 140; and such implication is always liable to be rebutted by evidence; *Shudall* v. *Jekyll*, 2 Atk. 516; *Debeze* v. *Mann*, 2 Bro. Ch. Rep. 165, 519; *Trimmer* v. *Bayne*, 7 Ves. 508. But the testator, by a codicil, subsequent to giving the portion or advancement, ratifying and confirming his will, though a new publication, has been held not sufficient to rebut the presumption of his intention to adeem the legacy; such words being only words of form; *Irod* v. *Hurst*, 2 Freem. 224. With respect to what legacies shall be considered

proved (3), notwithstanding the length of time, or alteration of circumstances; for a revocation by implication must be a necessary implication, and wholly inconsistent (*b*). And where it is said, that as the

(3) Swinburne, part 7. § 20.

accumulative and what merely in substitution, the rule which prevails in the civil law has been distinctly recognized as the rule which ought to obtain in our courts of equity, namely, that where two pecuniary legacies are given by the same will, primâ facie, they are not accumulative; but where the two legacies are in different writings, there the presumption shall be that they were intended as accumulative; see *Hooley* v. *Hatton*, 1 Bro. Ch. Rep. 390, in a note; *Ridges* v. *Morrison*, 1 Bro. C. R. 389; *Foy* v. *Foy*, 1 Cox's Rep. 163, 392; but the presumption in either case may be repelled by internal evidence; *Allen* v. *Callow*, 3 Ves. 289; *Barclay* v. *Wainwright*, 3 Ves. 462; *Holford* v. *Wood*, 4 Ves. 76; see *Osborne* v. *D. of Leeds*, 5 Ves. 369; *Benyon* v. *Benyon*, 17 Ves. 34; *Currie* v. *Pye*, 17 Ves. 482; *Jackson* v. *Jackson*, 2 Cox's Rep. 35. As to ademption of specific legacies, see the following section.

(*b*) The law will presume a testator to have intended to revoke his will, not only from a subsequent alienation or disposition of his property, inconsistent with his will, but also from a material alteration in the circumstances of his situation; and, therefore, a subsequent marriage and issue will, by implication, revoke a will made during celibacy. See Œuvres de Cochin, 2 T. p. 718. This implication is evidently founded on the presumption that a testator, having contracted a new relation, means

latter testament doth destroy the former, so the latter part of the testament doth

to discharge the duties which attach to it: and, as new objects of care arise, which he did not contemplate when he made his will, such will shall not be regarded as intended to prevail, but by operation of law is revoked. See *Lugg* v. *Lugg*, 1 Lord Raymond, 441; *Parsons* v. *Lance*, Ambl. 557: *Wellington* v. *Wellington*, 4 Burr. 2165; *Jackson* v. *Hurlock*, Ambl. 490, and cases there cited. *Christopher* v. *Christopher*, 4 Burr, 2182, in a note; *Spragg* v. *Stone*, Ambl. 721; *Brady* v. *Cubit*, Dougl. Rep. 31; *Shepherd* v. *Shepherd*, 5 Term Rep. 51, in a note; and *Doe*, on demise of *Lancashire*, v. *Lancashire*, 5 Term Rep. 49; in which it was held, that marriage and the birth of a posthumous child, would raise the presumption of an intention to revoke.

But if the disposition made by his will was not of his whole estate, the presumption of change of intention will not arise; and even in those cases in which the presumption does arise, evidence is admissible to rebut it. See *Brady* v. *Cubit*. It being thus settled, that a subsequent marriage, and having issue, will amount to an implied revocation of a will disposing of the whole of the testator's estate, it may be material to consider, whether either of those circumstances singly, as a subsequent marriage, or the subsequent birth of a child, will raise such presumption.—1st, With respect to marriage alone. In considering this point, it will be proper to distinguish wills of real estate from wills of personal estate: for, as to wills of real estate, it is not necessary that marriage alone should be a revocation of a will; because the law has, in most cases,

overthrow the former part: that is true, when it is evident that the testator did mean

provided for the wife out of her husband's lands; and though it were a revocation, it would not let in the claim of the wife, as the land would in such case descend to the heir. As to wills of personal estate, Lord Northington, in *Jackson* v. *Hurlock*, Ambl. 494, is reported to have said, "There is no determination that marriage singly would revoke a will of personalty. It would be dangerous to insist that marriage simply revokes a will; upon the other hand, it would be as dangerous to say, that no alteration of circumstances shall operate as an indication of intention to revoke. If such a case were to come before me, upon a legal interest, I should put into a proper way to be determined. There seems little reason to presume such intention, from the simple act of marriage, for the law has provided for the wife. There is no determination that marriage simply is a revocation of a will of land."

Dr. Hay, in giving judgment on the above case of *Shepherd* v. *Shepherd*, states, "that marriage and children at once revoke a will, but marriage alone will not; because the law allows other provisions for a wife, and she may provide for herself previous to her marriage; if she do not, it is her own fault, and the law will not presume any thing in her favour to revoke her husband's will. This is settled in abundance of cases, and is an incontrovertible position." In another passage of that very elaborate judgment, the learned Judge, in observing upon the case of *Jackson* v. *Hurlock*, states, "that case goes no further than to recognize the rule, that marriage without issue cannot revoke a will; which rule was before established by many

it should be so. But if it be doubtful, we ought to labour diligently to save the testa-

cases." A solemn adjudication upon a point immediately before a court of competent jurisdiction must, in all cases, materially weaken the force of any general reasoning militating against such adjudication; but it is observable, that this point, whether marriage alone will amount to an implied revocation of a will of personal estate, was not the point before the court; and that, though the learned Judge treats it as a point determined in many cases, he does not state a single one; and he evidently, if reliance may be had on the report of *Jackson* v. *Hurlock*, by Mr. Ambler, strains Lord Northington's observation in his judgment on that case beyond its fair tendency; for his Lordship does not recognize the doctrine, that marriage alone is not an implied revocation of a will of personal estate, but merely observes, that there is no determination that it is; and when referring to a will of real estate, he remarks, that there seems little reason to presume such intention from the simple act of marriage, for the law has provided for the wife; but he does not even in that case affirm, that it had been decided that it was not, but confines himself to stating, that "there is no determination that marriage simply is a revocation of a will of land." In the absence of precedent, and I confess I have found none, we must necessarily resort to general reasoning. That marriage and issue will raise an implication of intent to revoke a will made during celibacy is admitted; but upon what is such implication founded? Upon the credit which is due to every man, that he intends to discharge those moral duties which attach to the relation of husband and father, or, to use the language of Dr. Hay, as "new objects of care arise,"

ment from contradiction. If, therefore, the same thing be devised to two, and one dies,

to presume that he intends to extend towards them that protective kindness which is morally and naturally due to them. But why restrict the presumption which arises in favour of wife and children to the concurrence of both circumstances? The claim of the wife to a provision from the husband has, at least, a moral duty for its foundation. To allow a will made before the relation was contracted, and without requiring any circumstance indicative of an inclination that such will should stand, though by its effect the wife be left wholly destitute, seems to require a more conclusive reason than any I have met with in its support. Out of the real estate of which the husband is seised, the law has secured to the wife a provision; but out of the personal estate of the husband, except by special custom or intestacy, the law has made no such provision. The first reason, therefore, relied on by Dr. Hay, that "the law has made other provision for the wife," does not generally apply to wills of personal estate. The second reason which he assigns is, that "she may provide for herself previous to the marriage." It is certainly true that the wife might, previous to her marriage, stipulate for a provision out of personal estate; but it is equally true, that she might stipulate for a provision out of real estate. But the law has not, with respect to real estate, confined her interest to her discretion; its providence has interposed between her and those influences which might occasion her to overlook or disregard the considerations of prudence; it has given her an interest in the real estate of which her husband is seised; and however the good effects of this legal provision may, by means of trusts, &c. be disappointed the principle upon which it proceeds is too strongly

the other shall have the whole: or if both survive the testator, it shall be divided be-

marked and beneficially felt in the right of the wife to dower, to justify the narrowing of its operation. But it is said, if she do not provide for herself previous to her marriage, it is her own fault, and the law will not presume any thing in her favour to revoke her husband's will. What is her fault? That she has not, when acting upon the tenderest influences of the heart, pursued the dictates of prudence; that she has confided her claims to a provision to the honour, integrity, and affection of the man to whom she has confided her happiness. But if it be true that the law will not presume any thing in favour of the wife in respect of her omission, it is equally true that the law will presume nothing in favour of the husband? What does his moral character require? That the law should presume that he meant to make that provision which a husband is bound, "and probably would have made, had not a premature death prevented it." To supply that provision requires no streteh of rational conjecture; the honour, integrity, and affection of the husband may be presumed, and upon that presumption the moral claims of the wife may be satisfied. No precedent that I have been able to find contradicts this conclusion; but if there should be any, the reader will, I trust, examine its principle and reasoning before he entirely submits to its authority; bearing in mind, that that for which I have ventured to contend is not an absolute but merely an implied revocation, which is consequently liable to be encountered by every circumstance indicative of a different intention. See the cases collected in *Jackson* v. *Hurlock*, 2 Eden's Rep. 273, note (*a*).

twixt them(*c*), or they shall take it jointly (4). But it is sufficient, in last wills, for the re-

(4) Swinb. part 7. s. 21. *Blanford* v. *Blandford*,

3 Buls. 105. *Anon.* 3 Leon. 11. c. 27. *Wallop* v. *Darby*, Yelv. 209. Cro. Eliz. 9. 10 Med. 522. *Fane* v. *Fane*, 1 Vern. 80. *Ridout* v. *Pain*, 3 Atk. 493.

The next point is, whether the birth of a child subsequent to the making of a will, the effect of which would leave the child wholly destitute, is of itself a circumstance sufficient to raise a presumption of the testator's intention to revoke such will. That it would be if connected with other circumstances, see *Johnston* v. *Johnston*, 1 Phillimore's Rep. 447. See also Cod. lib. 8, De revocatione Donationis.

Dr. Hay, in the case of *Shepherd* v. *Shepherd*, felt how "desirable it was to provide for the innocent, and to supply to a child that provision which a father is bound to make, and probably would have made had not a premature death prevented it. But, however well-founded (continues the learned judge) this maxim may be, and worthy the attention of a legislator and politician, yet it must yield to the positive laws of society, particularly in a country of freedom like this; otherwise, to benefit one, all might be injured." He afterwards observes, that a revocation had never been implied "on the mere ground of the birth of a child."

If reliance may be had on the accuracy of the reporter, the case of *Overbury* v. *Overbury*, 2 Show. 242, is an authority in favour of such an implied revocation. "Upon an appeal before sentence to the delegates, it was adjudged, that if a man make his will, and disposes of his personal estate amongst his relations, and afterwards hath children and dies, that this is a revocation

voking of a legacy, that the testator's meaning do appear by an act otherwise insuffi-

of his will, according to the notion of the civilians, this being inofficiosum testamentum." And in the case of *Wingfield* v. *Combe*, 2 Ch. Ca. 16, Lord Nottingham stated the following case: *A.*, having only a daughter, devised to trustees to convey the land to the daughter in fee; the testator recovered, and after had a son; the daughter shall not carry the land from the son." But, though there were no authority in favour of a presumption allowed to deserve the attention of the legislator and politician, I should submit that its adoption by the judge would not be a stretch of those powers and sound discretion which are confided to him in the administration of justice. Dr. Hay stated several cases which appeared to him to negative the claim of the child. The first case, *Wells* v. *Wilson*, is, however, an authority in favour of the child; but the learned judge refers the decision to the peculiar circumstances of the case. The second case, *Waltham* v. *Gray*, terminated in a compromise. The third case, *Ward* v. *Phillips*, respected the claim of a posthumous child, and the decree which set aside the will was reversed by the delegates, "This (says the learned judge) is a solemn adjudication, and, if founded on principle, must be decisive in the present case." It is observable, that the case of *Shepherd* v. *Shepherd* was also upon the claim of a posthumous child; but it may be inferred, from the statement of that case, that the mother was in the third month of her pregnancy at the time of her husband's death, which affords a reasonable ground for presuming the husband's knowledge of her situation, and consequently for presuming his intention to provide for such child. But in the case of *Ward* v. *Phil-*

cient; as if the gift or alienation, not being of necessity (*d*), but voluntary, be void in

lips, the statement affords no such inference; and it is possible that the father was, at the time of his death, wholly ignorant of the pregnancy of his wife, a fact which would prevent any presumption of particular intent in favour of the child. But not to insist on any nice distinction or even material difference between the cases of *Ward* v. *Phillip*, and *Shepherd* v. *Shepherd*, and allowing the first to be a solemn adjudication against the claim of the child, I will now proceed to try it by the test proposed by the learned judge, namely, whether it be founded on principle, and will, for such purpose, waive the authority of the contrary decision in the case of *Overbury* v. *Overbury*, and the other case referred to in 2 Ch. Ca. 16.—The principle which raises the presumption, that every man means to discharge the natural and moral obligations which attach to him, is a principle founded on the purest candour, and its applicability to certain cases is allowed: unless, therefore, there be in the law of England some positive rule which so restricts and narrows the operation of this principle, it will be difficult to maintain, that the claims of general conveniency, or that the interests of justice require its circumscription within the limits prescribed to it by the learned judge. It is admitted, that in the Roman law, the birth of children operated as a revocation of a precedent will, and that the Roman law in general guides the decrees of the ecclesiastical courts. But (says the learned judge) "it guides our decrees no further than where it stands uncontradicted by the English law."—Tha law of England certainly does, in some instances, control the civil law in matters of ecelesiastical cognizance; and, in such instances, it is the duty of the

(5) Swinb. part 7, s. 20, 21. *Roper* v. *Radcliffe*, 1 Bro. Parl. Ca. 450. *Beard* v. *Beard*, 3 Atk. 72.

law (5); yet the second will must be a good will, in all circumstances, to revoke a for-

ecclesiastical courts to reject the rule of the civil law. But how or where has the law of England laid down a rule different from the rule of the civil law upon this point? Had such rule been prescribed by the legislature, it had been produced; had it grown up with our common law, it had been traceable, at least, in some of our institutes; but neither the statute book nor the profound treatises of our most learned and elaborate writers furnish any such rule. It must, therefore, if it do exist, be some conclusion necessarily resulting from a substantial difference between the Roman and English law in some other particular, and upon this ground the learned judge has rested it. "In this point," he observes, "there is a material distinction between the Roman and English law; in the former, the children are considered as having a property in the effects of the father; in our law we know of no such thing, and therefore the effect of the birth of children must be very different." But though by the law of England children have not an indefeasible property in the effects of the father, they have a moral and natural claim upon him. The law of England has not, indeed, in all cases raised that claim into a legal right; neither has it annulled it, but has confessedly acknowledged it and given it effect at least under some circumstances; Marriage and issue are allowed to operate as an implied revocation. Has the wife property in the effects of her husband? If she has, by a parity of reasoning, marriage alone would be an implied revocation; but it is said, that simply it is not. The wife then has no property in the effects of the husband, neither have the children any property in the effects of their father; but

mer (6), if being intended to operate as a will, and not merely as an instrument of revocation (e).

(6) Swinb. part 7. s. 14. *Onions* v. *Tryer*, 1 P. Wms. 343. *Limbery* v. *Mason*, Comyn's Rep. 451.

marriage and issue will operate as an implied revocation; but, as neither wife nor child has a property in the effects of the testator, the revocation cannot be implied in respect of a property in the effects of the testator. The distinction, therefore, between the Roman and English law in this particular cannot be the foundation of the difference contended for between the birth of a child and marriage, and the birth of a child only. The learned judge proceeds: "In England the father may dispose of his effects as he pleases, and his will must stand, if it be plain, by a solemn execution, that he meant it should stand." The testamentary right is admitted: but if the effect of its exercise be as stated by the learned judge, that the will must stand, it might be material to inquire how its revocation is implied by marriage and the birth of a child. The learned judge admits, that "a parent shall not be presumed to leave his child without provision, an infant who certainly could never have offended him:" "But here (says the learned judge) he has actually done it;" and so he has actually done it in the case in which the law will imply a revocation. It is equally under his hand, but the law interposes and prevents an effect which it cannot presume the testator to have intended, without refusing to him credit for those moral and natural feelings, with which nature has secured the claims of the child. But though the law presumes that to have been intended which the general dictates of nature would inspire, it stops there; in favouring the claims of the child, it breaks not in upon the disposing right of the father:

the presumption which it raises yields to circumstances indicative of a contrary intention, and efficiently operates only in those cases where no such circumstances occur. See *Gibbons* v. *Caunt*, 4 Ves. 840.

(*c*) See 1 vol. b. 1. c. 6. s. 19. in which the difference of opinion upon this point is stated.

(*d*) It must also be a subsisting will at the time of the testator's death; *Goodright* v. *Glazier*, 4 Burr. 2512; unless the second will expressly revoke the first; for, in such case, the first will being once clearly revoked, nothing but a new will can set it up again. *Burtenshaw* v. *Gilbert*, Cow. 49.

(*e*) Our author here refers to wills of real estate, in which a difference of solemnities is prescribed, as to a will which is to operate substantively, and a will which is merely to revoke a former. As to such points of difference, see 1 vol. b. 1. c. 3. s. 10. and *Onions* v. *Tryer*, 1 P. Wms. 343.

SECTION II.

In a devise of debts, the true distinction seems to be between a legacy in numeratis, and a specific legacy. For in the first case, the legacy will remain, though it is devised out of debts paid in to the testator: But a specific legacy may be lost by being altered (1). And there is no foundation (2) for the difference taken in the books (3) between a voluntary and compulsory payment (*f*), for the latter might be

(1) *Pawlett's* case, Raym. Rep. 335. *Savile* v. *Blackett*, 1 P. Wm. 779. *Rider* v. *Wager*, 2 P. Wms. 331. *Attorney General* v. *Parkyn*, Ambl. Rep. 566. *Ashburner* v. *Macguire*, 2 Bro. Ch. Rep. 108. (2) *Orm* v. *Smith*, 2 Vern. 681. *Earl of Thomond* v. *Earl of Suffolk*, 1 P. Wms. 464. *Ford* v. *Fleming*, 2 P. Wms. 469. *Attorney General* 1. *Parkin* Ambl. Rep. 566. *Ashburner* v. *Macguire*, 2 Bro. Ch. Rep. 108. *Badrick* v. *Stevens*, 3 Bro. Ch. Rep. 431. (3) *Crockatt* v. *Crockatt*, 2 P. Wms. 164. *Lawson* v. *Stich*, 1 Atk. 508. *Partridge* v. *Partridge*, Forrest 228. See also Swinburne, part 7. s. 20. *Drinkwater* v. *Falconer*, 2 Ves. 624.

(*f*) Though the distinction between a voluntary and compulsory payment be exploded where the bequest is specific; *Stanley* v. *Potter*, 2. Cox's R. 180; *Humphreys* v. *Humphreys*, 2 Cox's R. 184; yet the distinction has been allowed in some cases where the legacy was in numeratis; see *Coleman* v. *Coleman*, 2 Ves. jun. 639; and in some of the cases in which the distinction is denied, it has been held, that a payment of the debt, when voluntary or compulsory, shall not adeem a legacy in numeratis; *Earl of Thomond* v. *Earl of Suffolk*, 1 P. Wms. 464. *Ashton* v. *Ashton*, 3 P. Wms. 384. *Brons-*

with an intent to secure the legacy in all events.

don v. *Winter*, Ambl. 57. *Attorney-General* v. *Parkin*, Ambl. 566, and in others, that a payment though voluntary, shall adeem the legacy, though in numeratis. *Bradrick* v. *Stephens*, 3 Brown's Ch. Rep. 431. *Innes* v. *Johnson*, 4 Ves. 574. See *Hambling* v. *Lister*, Ambl. 401; which refers to intention of testator to adeem or not. *Fryer* v. *Morris*, 9 Ves. 360. *Stanley* v. *Potter*, 2 Cox's R. 180.

SECTION III.

And regularly (*g*) if the legatory die before the testator, or before the condition upon which it is given to be performed, or before the legacy be vested in interest, the

(*g*) The rule is properly stated as a general rule; for a bequest may be so specially framed as to prevent the death of the legatee operating a lapse of the legacy. See *Sibly* v. *Cook*, 3 Atk. 572. *Sibthorpe* v. *Moxon*, 3 Atk. 580. *Bridge* v. *Abbott*, 3 Bro. Ch. Rep. 224. *Evans* v. *Charles*, 1 Anstr. 128. *Jennings* v. *Gallimore*, 3 Ves. 146. *Parry* v. *Boodle*, 1 Cox's R. 183. But the bequest being to the legatee, his executors, &c. will not prevent the lapse. *Maybank* v. *Banks*, 1 Bro. C. R. 84. Neither will the rule extend to a legacy to two or more; for though, by the civil law, there is no survivorship amongst legatees; Swinburne, part 1. s. 7; yet it is

legacy is extinguished (1); Yet it is otherwise, when the legatee takes as nominee

(1) Swinb. part 1. s. 7. 4. *Stapleton* v. *Cheales*, Gilb. Rep. 76.

settled, that a legacy to two or more is not extinguished by the death of one, but will vest in the survivor. *Northey* v. *Burbage*, Gilb. Rep. 137. *Buffar* v. *Bradford*, 2 Atk. 220. Nor will the rule exend to those cases where the legacy is given over after the death of the first legatee; for, in such cases, the legatee in remainder shall have it immediately. 1 And. 33. pl. 82. *Miller* v. *Warren*, 2 Vern. 207. *Perkins* v. *Mickelthwaite*, 1 P. Wms. 274. *Willing* v. *Baine*, 3 P. Wms. 113. *Schoolding* v. *Green*, Pre. Ch. 37. *Hornsby* v. *Hornsby*, Mosely, 319. *Darrell* v. *Molesworth*, 2 Vern. 378. *Roden* v. *Smith*, Ambl. 588. 3 Ves. jun. 15, 16. Nor will a legacy lapse by death of legatee in testator's life-time, if he be to take as a trustee. See *Oke* v. *Heath*, 1 Ves. 140. But see *Eacles* v. *England*, 2 Vern. 468, where the point is doubted. As to vested legacies, see the following section. That the heir shall take the benefit of a lapsed devise, see Fortescue's Rep. 182, 184. 2 Bla. Rep. 736. *Morris* v. *Underdown*, Willes Rep. 293. In what cases a lapsed legacy shall not devolve to the residuary legatee, *Davers* v. *Dewes*, 3 P. Wms. 40. *A. G.* v. *Johnsone*, Ambl. 577. *Robinson* v. *Taylor*, 2 Bro. Ch. Ca. 589. That upon the lapse of the residuary bequest, by the death of the residuary legatee in the life-time of the testator, the next of kin shall not have the benefit of the exception of the personal estate, from payment of debts, &c. See *Waring* v. *Ward*, 5 Ves. 670. *Pickering* v. *The Earl of Stamford*, 4 Bro. C. R. 214. *Leake* v. *Robinson*, 2 Meriv. 363. *Noel* v. *L. Henley*, Exch. 1819. That a bequest void at law shall fall into the residue, see *Dawson* v. *Clark*, 15 Ves 416. *Pratt* v. *Sladden*, 14 Ves. 163, 199.

only (*h*), and the legacy is but the execution of a trust (2). So when the legacy is not conditional, but modal, as 20*l.* devised to a boy to bind him apprentice, and he dies before he is bound, his executor or administrator shall have it; because the same is actually devised to him, and the act of God shall not take it out of him (3). So if it were devised to be paid him within six months after he shall have served his apprenticeship, the serving the apprenticeship, is not a condition annexed to the legacy, but only an appointment when it should be paid. And though a will is no deed, because a seal is not necessary to it (*i*), yet it may have the force and effect of a deed: and therefore if a person says in his will, "I forgive such a debt, or my

(2) *Burnett* v. *Holgrave*, 1 Eq. Ca. Ab. 296, 297.

(3) *Barlow* v. *Grant*, 1 Vern. 255. *Nevil* v. *Nevil* 2 Vern. 431.

(*h*) The case referred to, *Burnett* v. *Holgrave*, is considerably weakened, in point of authority, by the case of *Oke* v. *Heath*, 1 Ves. 135.

(*i*) A will, as it cannot take effect in the life-time of the testator, cannot, though sealed and delivered, take effect as a deed. *Elliott* v. *Davenport*, 1 P. Wms. 83. But though a will and a deed cannot unite, yet an instrument, though called a deed, and in the form of a deed, may be testamentary. *Habergham* v. *Vincent*, 1 Ves. jun. 235; see *Thorold* v. *Thorold*, 1 Phillimore's Rep. 1.

executor shall not demand it," this is a discharge of the debt (*j*), though the debtor dies in the life of the testator (4). But, if a debt is mentioned to be devised to the debtor without words of release or discharge of the debt, if the debtor died before the testator, that will be a lapsed legacy, and the debt will subsist. And if the first clause in the will imports a devise only, and the latter clause amounts to a release and discharge of the debt, the latter clause shall be coupled with the former, as to be ancillary and dependent upon it, viz. if the legacy took effect, then the executor to release, &c. (5).

(4) *Silthorpe* v. *Moxom*, 3 Atk. 580. *Toplis* v. *Baker* E. Hil. T. 1789. 1 P. Wms. 86, note (2), Cox's ed.

(5) *Elliott* v. *Davenport*, 1 P. Wms. 83. *Toplis* v. *Baker*, 2 Cox's R. 120.

(*j*) That a parol declaration by the obligee may operate in equity as a release of a bond, see *Weckett* v. *Raby*, 3 Bro. P. C. 16. See *Eden* v. *Smyth*, 5 Ves. 341.

SECTION IV.

BUT a legacy is an immediate duty though payable in futuro, and is an interest vested (*k*), which shall go to the executor

(*k*) As if the legacy be to the legatee, payable to him at a certain age, and the legatee die before he attain such age, yet this is a vested and transmissible interest in the legatee; for it is debitum in presenti, though solvendum in futuro; *Cloberry*'s case, 2 Vent. 342. 2 Ch. Ca. 155; *Collins* v. *Metcalfe*, 1 Vern. 462; *Gordon* v. *Raynes*, 3 P. Wms. 138; *Anon.* 2 Vern. 199; but the representative of the legatee must wait till the time at which the legacy is payable, unless the whole interest be given; *Harrison* v. *Buckle*, 1 Stra. 238, *Crickett* v. *Dolby*, 3 Ves. jun. 15; but if the legacy be to the legatee generally, at or when he attain such age, it will lapse by the death of the legatee before such age. *Cloberry*'s case, 2 Vent. 342. *Snell* v. *Dee*, 2 Salk. 415. *Onslow* v. *South*, 1 Eq. Ca. Ab. 295, 296. *Spink* v. *Lewis*, 3 Bro. 355; *Sansbury* v. *Read*, 12 Ves. 75. And this distinction, which is borrowed from the ecclesiastical court, though denied by the Lord Keeper in *Yates* v. *Fettiplace*, 2 Vern. 417; appears to have been frequently recognized. See *Dawson* v. *Killett*, 1 Bro. Ch. Rep. 119, but does not prevail in the construction of devises of real estate, nor is to be extended or favoured in the construction of personal legacies; *Machell* v. *Winter*, 3 Ves. jun. 544. If the legacy be made to carry interest, though the words "to be paid,

or administrator of the legatee. So of a share of intestate's estate, or a sum of money devised out of lands (*l*); for it is looked upon as a legacy, and depends merely on the will, and is governed by the ecclesiastical law, which is so; otherwise where it depends upon a deed; for a trust is guided by the intent. And if a settlement is made and lands charged with such

or payable," are omitted, it is a vested and transmissible interest. *Cave* v. *Cave*, 2 Vern. 508. *Clobery*'s case, 2 Vent. 342. Ch. Ca. 155. *Stapleton* v. *Cheales*, 2 Vent. 673. *Hubert* v. *Parsons*, 2 Ves. 263. *Fonnereau* v. *Fonnereau*, 3 Atk. 645. So if the bequest be to A. for life, and after the death of A. to B., the bequest of B. is vested upon the death of testator and will not lapse by the death of B. in the life-time of A. *Anon.* 2 Vent. 347. *Pinbury* v. *Elkin*, 1 P. Wms. 566. *Darrell* v. *Molesworth*, 2 Vern. 378. *Tunstall* v. *Brachen*, Ambl. 167. *Dawson* v. *Killett*, 1 Bro. Ch. Rep. 119. *Jeal* v. *Titchener*, 4th July 1771. *Clarke* v. *Ross*, 22d November 1773; stated in a note to *Dawson* v. *Killett*. *Barnes* v. *Allen*, 1 Bro. Ch. Rep. 181. *Monkhouse* v. *Holme*, 1 Bro. Ch. Rep. 298; so where interest is given before the time of payment, it is evidence of intention that it should vest; *Walcott* v. *Hall*, 2 Bro. C. R. 305; *Collins* v. *Metcalfe*, 1 Vern. 462; *Hatch* v. *Mills*, 1 Eden's Rep. 345, where the cases are brought together in a note.

(*l*) See *Stapleton* v. *Cheales*, Pre. Ch. 317, and b. 2. pt. 1. c. 8. s. 7. note (*f*).

a sum of money, as a will shall declare; there the will would be but declarative and not operative (1). And this is the true difference (2), (and not that which is laid down in some books,) that where the time is annexed to the legacy itself, and not to the payment of it, if the legatee dies before the payment, it is a lapsed legacy: Otherwise, if the time be annexed only to the payment of it (*m*). So a contingency, as after the death of the first devisee without issue living at his death, vests immediately, though not assignable over (*n*); for this is a near and common possibility. And where words refer to that which must needs happen, there shall be no contingency (3).

(1) *Lord Pawlett's* case, 2 Ventr. 366, 367.

(2) *Snell* v. *Dee*, 2 Salk. 415. *Dawson* v. *Killett*, 1 Bro. Ch. Rep. 119.

(3) *Harvey* v. *Ashton*, 2 Eq. Ca. Ab. 539. in a note. See *Lord Douglas* v. *Chalmer*, 2 Ves. jun. 501.

(*m*) This difference does not hold as to legacies or portions charged on real estate; *King* v. *Withers*, Forrest. 122; *Pawlett* v. *Pawlett*, 1 Vern. 204. 321; *Yates* v. *Fettiplace*, 2 Vern. 417; unless the time of payment be postponed for the convenience of the estate.

(*n*) That such an interest is, though not grantable at law, transmissible and advisable, see b. 1. c. 4. § 2.

SECTION V.

LASTLY, If a man devises specific legacies (*o*) and pecuniary legacies, and the estate falls short to answer the pecuniary

(*o*) "There are two kinds of gifts included under the description of specific legacies. First, when a particular chattel is specifically described and distinguished from all other things of the same kind: Secondly, something of a particular species which the executor may satisfy by delivering something of the same kind, as a horse, a diamond ring, &c. The first kind may be more properly called an individual legacy; and if the thing so bequeathed is not found among the testator's effects, it fails, (see *Selwood* v. *Mildmay*, 3 Ves. jun. 310;) or if given first to A. and then to B. they must divide it; or if it is disposed of in the life of the testator, it is an ademption of such legacy." See Lord Hardwicke, *Purse* v. *Snaplin*. 1 Atk. 416, 417. See also Domat, 2 vol. B. 4. tit. 2. § 11, 21.

As to what will be a sufficient description to render the legacy specific, it may be proper to observe, that our courts lean against considering legacies as specific, because of the consequences; per Lord Hardwicke, *Ellis* v. *Walker*, Ambl. 310; see *Hinckley* v. *Simmonds*, 4 Ves. 161; *Nesbitt* v. *Murray*, 5 Ves. 149; *Chaworth* v. *Reech*, 4 Ves. 555; *Innes* v. *Johnson*, 4 Ves. 568; *Kirby* v. *Potter*, 4 Ves. 748. 750; *Raymond* v. *Brodbelt*, 5 Ves. 199; *Barton* v. *Cooke*, 5 Ves. 461; but if the words are clearly indicative of an intention to separate the parti-

legacies, they shall abate in proportion (*p*); but nothing shall be abated from the spe-

cular thing bequeathed from the general property of the testator, such intention shall prevail; therefore, though it be difficult to make pecuniary legacies specific, yet such there are, as a certain sum of money in a certain bag or chest; *Lawson* v. *Stitch*, 1 Atk. 508; or the bequest of a sum of money in the hands of B.; *Hinton* v. *Pinke*, 1 P. Wms. 540; or of 2,000 *l.* the balance due to testator from his partner on the last settlement between them, if the testator did not draw it out of trade before he died; *Ellis* v. *Walker*, Ambl. 310; so a bequest of a bond, or of a testator's stock in a particular fund; *Ashburner* v. *Macguire*, 2 Bro. Ch. Rep. 108; *Ashton* v. *Ashton*, Forest. 152; *Avelyn* v. *Ward*, 1 Ves. 425: or a legacy to be paid out of the profits of a farm which the testator directed to be carried on; *Maquet* v. *Maquet*, 2 Bro. Ch. Rep. 125; if there be no such fund as that referred to by testator for the payment of the legacy, the legacy shall not be construed as specific, *Mann* v. *Copland*, 2 Maddock's Rep. 223; but see *Gittins* v. *Steele*, in 1 Swanston's Rep. 24, as to failure of fund charged; and as the testator, having distinguished and separated a particular chattel or part of his property from the general bulk of it, will render the bequest of such particular chattel a specific legacy, so may the testator carve specific legacies out of such specific chattel; as where the testator gives part of the debt due to him from A., it will be a specific legacy, *Heath* v. *Parry*, 3 Atk. 103; so a bequest of part of testator's stock in a particular fund; *Sleech* v. *Thoringdon*, 2 Ves. 563; *Deane* v. *Test*, 9 Ves. 146; *Sibley* v. *Perry*, 7 Ves. 530; *Webster* v. *Hale*, 8 Ves. 410; and if the chattel so parcelled out into several specific legacies

cific legacies (2). And where one devises to his wife all his personal estate at *W.*, this

(1) *Sayer* v. *Sayer*, 2 Vern. 688. *Brown* v. *Allen*, 1 Vern. 31. *Hern* v. *Meyrick*, 1 Salk. 416.

prove deficient, the specific legatees, though not liable to abate with the general legatees, must abate proportionably among themselves; *Sleech* v. *Thoringdon*; as must specific legatees on distinct chattels of deficiency of general assets; *Duke of Devon* v. *Atkins*, 2 P. Wms. 382; *Long* v. *Short*, 1 P. Wms. 403; whether a legacy of money to be paid out of a certain fund shall be adeemed by failure of the fund; see *Savile* v. *Blacket*, 1 P. Wms. 778; *Smith* v. *Fitzgerald*, 3 Ves. & B. 2. That evidence is admissible to show the state of testator's property at the time of making his will, see *Selwood* v. *Mildmay*, 3 Ves. jun. 308.

With respect to Lord Hardwicke's second kind of specific legacies, where the executor may satisfy the legacy by delivering something of the same kind, the will being merely descriptive of the species and not of the individual thing, as an horse, &c. see *Partridge* v. *Partridge*, Forrest. 227, and *Bransdon* v. *Winter*, Ambl. 57.

(p) And as all legatees are on a deficiency of assets to be paid in proportion, so if the executor pay one of the legatees, yet the rest shall make him refund in proportion: nay, if one of the legatees get a decree for his legacy and is paid, and afterwards the assets appear to have been originally deficient, yet the legatee who received shall refund; but if the executor had at first enough to pay all the legacies, and afterwards by his wasting the assets, they become deficient, in such case the legatee who has received his legacy, shall not be compelled to refund, but shall retain the advantage of

is a specific legacy, and is as if he had enumerated all the particulars there (2). So a specific legatee is not to abate in proportion with other legatees (*q*), where there

(2) *Sayer* v. *Sayer*, 2 Vern. 688.

his legal diligence, which the other legatees neglected by not bringing their suit in time before the wasting by the executor; whereas, if the other legatees had commenced their suit before such waste committed, they might have met with the like success; et viligantibus non dormientibus jura subveniunt. *Anon.* 1 P. Wms. 495. *Edwards* v. *Freeman*, 2 P. Wms. 446; *Walcot* v. *Hall*, 2 Bro. Ch. Rep. 305. But though a legatee who has received his legacy may, if the assets were originally deficient, be called upon by other legatees to refund, yet he is not bound to refund at the suit of the executor, unless the payment by the executor was compulsory; *Newman* v. *Barton*. 2 Vern. 205; *Orr* v. *Kaines*, 2 Ves. 194; or the deficiency created by debts which did not appear till after payment of the legacy; *Nelthorp* v. *Hill*, 1 Ch. Ca. 136; *Gilbert* v. *Whitmarsh*, V. C. July 1818: but the executor will, in such case, be personally liable; *Vintner* v. *Pix*, 1 Ch. Rep. 71; but if there be a deficiency to pay debts, a legatee who has received his legacy is, in all cases, liable to refund to creditors; *Noel* v. *Robinson*, 1 Vern. 94, 162; *Hodges* v. *Waddington*, 2 Vent. 360; *Davis* v. *Davis*, Dick. Rep. 32; *Hardwicke* v. *Mynd*, Anstr. Rep. 113. That a creditor is not liable to refund a part of his debt received before bill filed, in order to come in pari passu with other creditors, see *Lowthian* v. *Hassel*, 4 Bro. 170. As to refunding for creditors, see *Anon.* 1 Vern. 162.

(*q*) But specific legatees must abate proportionally amongst themselves if there be a deficiency of general assets; *D. of Devon* v. *Atkins*, 2 P. Wms. 381.

is a deficiency to pay debts (3): yet in any case, he cannot have more than the testator devised him, although the testator had not power over it. So when the testator doth bequeath any thing in satisfaction or recompence of some injury by him done, this legacy is not to abate any more than a specific legacy: but if a man devises specific and pecuniary legacies, and afterwards says, that such pecuniary legacies should come out of all his personal estate, or words tantamount; or if there is no other personal estate than the specific legacies; they must be intended to be subject to the pecuniary legacies, otherwise he must mock the legatees (4). So a legacy devised to be paid in the first place shall abate (*r*) if the legacies fall short (5). So a devisee of 100 *l.* per an., to be set out by his executor, is not a specific legacy, but quantitatis (6).

(3) *Webb* v. *Webb*, 2 Vern. 111.

(4) *Sayer* v. *Sayer*, Pre. Ch. 393.

(5) *Brown* v. *Allen*, 1 Vern. 31.

(6) *Hume* v. *Edwards*, 3 Atk. 693. *Lewen* v. *Lewen*, 2 Ves. 427.

(*r*) See *Lewen* v. *Lewen*, 2 Ves. 417, in which case Lord Hardwicke states, that he should have doubted the determination of *Brown* v. *Allen*, had the legacy been a provision for a wife.

PART II.

CHAP I.

Of the Probate of Wills.

SECTION I.

BUT we cannot omit making some mention of executors and administrators, at least with respect to their office and duty. Executors and administrators differ in little else than in the manner of their constitution, their offices being almost exactly the same. And this consists chiefly in three things: 1st, the proving the will; 2dly, the payment of debts; and, 3dly, the making an account. As to the first, the ecclesiastical court is the proper place to try wills and to prove them, and the chancellor will not try them here (*a*). But although the probate of

(*a*) The probate of wills appears to have been anciently in the county courts, but the jurisdiction of the county court having been lost by non-usage, the

a testament of personals belongs only to the spiritual court; yet of lands, or such things as savour of the realty, it is otherwise; however, by agreement they may be proved there. And in some boroughs a devise of lands is, by custom, reputed a devise of chattels, and so proved before the ordinary, and after before the mayor in the hustings (1). So the prerogative court of Canterbury is not to prove a will concerning the guardianship of a child, which is a thing connusable in Chancery, and to be adjudged, whether it be devised pursuant to the statute (2). But they may prove a

(1) *Netter* v. *Percival Brett*, Cro. Car. 396. Godolphin's Orph. Leg. 58.

(2) *Lady Chester*'s case, 1 Ventr. 207.

spiritual court is the only court which, except by special custom, has now authority to receive the probate of wills. The seal of the ecclesiastical court is, therefore, conclusive evidence of the will; *Chichester* v. *Phillips*, Raym. 404. 407; *Noel* v. *Wells*, 1 Sid. 359. But though courts of equity cannot decide upon the validity of a will, they may, in certain cases, affect a legacy or the residue with a trust, as where the legatee has obtained his legacy by fraud; or upon a promise to take as a trustee for another; see B. 1. c. 2. § 3. note (*u*); or where the words of the will imply a trust of the residue for the next of kin; see B. 2. c. 5. § 3. note (*k*).

And it has never been thought, that courts of equity have, by declaring a trust, in any such cases, infringed upon the jurisdiction of the ecclesiastical courts; *Marriott* v. *Marriott*, 1 Str. 666. Gilb. Reports, 203.

will which contains goods and lands(3); though formerly a prohibition used to go quoad the lands (4), for the spiritual court could not prove the will in part; for the will was the whole will, and not a part.

(3) *Lady Chester*'s case, 1 Ventr. 207. *Partridge*'s case, 1 Salk. 552. *Netter* v. *Brett*, Cro. C. 396.
(4) 2 Rolle's Ab. 315. pl. 1.

SECTION II.

BUT, as to executors, probate is not the matter, for he is executor notwithstanding in our law, and may do all acts, except sustaining actions; in which case he must appear to the court judicially to be the executor (*b*) (1.) Yet if he shews it to the

(1) Wentw. Off. of Ex. c. 3. p. 33. Godolph Orph. Leg. p. 2. c. a. 20. *Middleton*'s case, 5 Rep. 28. a. *Hesloe*'s case, 9 Rep. 38. *Parten*'s case, 1 Mod. 213.

(*b*) Though an executor, before probate, cannot maintain an action in right of his testator, he may maintain an action in right of his possession of his testator's effects; *Greysbrook* v. *Fox*, Plowd. 281, a. As to the particular acts which an executor may do before probate, see Godolph. Orp. Leg. p. 2. c. 20; Wentw. Off. of Executor. An executor may also be sued before probate if he has administered the testator's effects; *Parten*'s case, 1 Mod. 213; *Bowers* v. *Cook*, 5 Mod. 136. 137; Went. Off. Ex. 36. An executor may also, before probate, be compelled to discover the personal

court when he declares, it is sufficient, though it was proved after the action brought (2). And if one executor (*c*) proves the will, it suffices for all. Neither is the refusal before the ordinary any estoppel to administer afterwards when they please in our law (3). And we have no regard in this point to the ecclesiastical law, where a renunciation is peremptory (*d*). And if an executor dies, the executor of the executor shall be charged; for he is executor of

(2) 1 Rolle's Ab. 917. pl. 2. *Duncomb* v. *Walter*, 1 Ventr. 370. Raym. 481. *Wankford* v. *Wankford*, 1 Salk. 302, 303.

(3) *Pawlett* v. *Freak*, Hard. 111. *House* v. *Lord Petre*, 2 Salk. 321. *Robinson* v. *Pett*, 3 P. Wms. 251. *Rex* v. *Simpson*, 3 Burr. 1463. 1 Black. Rep. 456.

estate of his testator, though a suit be pending in the spiritual court respecting the validity of the will; *Dulwich College* v. *Johnson*, 2 Vern. 49; whether the probate confer any particular authority on the executor, see *Allen* v. *Dundas*, 3 Term. Rep. 125; in which case the *Anon.* case in Comyns's Rep. 150, is particularly considered and over-ruled.

(*c*) But if all the executors named in the will refuse to prove the will, they cannot afterwards administer, or act as executors, by force of the will; but they may afterwards prove the will; Plowd. 281. *Hensloe*'s Case, 9 Rep. 37, b; unless administration has been granted upon their first refusal; Wentw. Off. Ex. 38; *Broker* v. *Charter*, Cro. Eliz. 92. Owen 44.

(*d*) And, therefore, notwithstanding the refusal of an executor, administration cannot be granted to another in his life-time, should he be the surviving executor, until he be again cited, and have again refused;

course, if the will be proved, because there needs no new probate. But no one can prove the will but he who is named executor in the will, and therefore he must take administration with the will annexed, if the executor died before the probate (4); for administration is an act in pais, of which the spiritual court cannot take judicial notice.

(4) *Wankford* v. *Wankford*, 1 Salk. 309. 1 Roll Ab. 907. pl. 10. Dyer, 372, pl. 8.

but if, when surviving executor, he do actually renounce, then administration to another will be good. *House* v. *Lord Petre*, 1 Salk. 311. *Wankford* v. *Wankford*, 1 Salk. 308. *Rex* v. *Simpson*, 3 Burr. 1463. *Arnold* v. *Blencowe*, 1 Cox's R. 426.

SECTION III.

And if a man makes his will, which is proved, the ordinary cannot change it, nor make another executor or administrator; because this was the testator's act, and he hath his authority immediately from the testator, and is like the *hæres* in the civil law, only he is to take nothing to his own use. Nor hath the ordinary

any power to grant administration, but when the person deceased did die intestate, or that the executors either will not or cannot perform the office (*e*). For the executor is constituted by the testator himself, and by him thought fit, and the ordinary cannot adjudge him not to be so upon a disability (*f*) by the canon law, as where he became a bankrupt (*g*); for that is not received here, but as far as admitted from time immemorial (1). Otherwise of a natural disability, as non

(1) *Rex* v. *Raynes*, 1 Salk. 299. Skin. 299. *Mills'* case.

(*e*) And therefore a grant of the administration before the refusal by the executor is void. *Abraham* v. *Cunningham*, 1 Vent. 303. 2 Lev. 182. J. Jones, 72. 2 Mod. 146.

(*f*) As to what persons are incapable of being executors, see Godolph. Orph. Leg, part 2. c. 6. Wentw. Off. of Exec. p. 17.

(*g*) Though bankruptcy does not determine the legal right of the executor, the court of Chancery will, in order to protect the effects of the testator, appoint a receiver. *Ex parte Ellis*, 1 Atk. 701. And so it will also, if the executor appears to be wasting the estate, or be a person in doubtful circumstances; and, upon the application of a creditor will secure the fund, though misconduct or insolvency be not imputable to the executor. See *Strange* v. *Harris*, 3 Bro. Ch. Rep. 365.

compos, &c. (2). And if an executor (3) takes administration (*h*), or be once sworn, though he will not after administer, the ordinary cannot take any other (4); but it shall be accounted the testator's folly to make such an one executor as will not administer. And, after an executor has once administered, he cannot refuse; or else an executor might convert the goods to his own use, and then refuse, so that a man should never recover against him, which would be against reason: Wherefore the ordinary ought, in such case, to compel him to prove the testament, under pain of excommunication, &c. (5).

(2) *Hills* v. *Mills*, 1 Salk. 36.
(3) Wentw. Off. Exec. p. 39.
(4) *Anon.* 1 Ventr. 335.
(5) *Hensloe*'s case, 9 Rep. 36. *Parten*'s case, 1 Mod. 213.

(*h*) What shall be deemed such an administering by an executor, as will preclude his refusal to prove the will, see Went. Off. of Exec. p. 39.

SECTION IV.

For the ordinary may make process against executors to prove their testament, and if they do not come, they shall be excommunicated; and if they come

and refuse, the ordinary ought, in all that he can, to perform the will of the deceased (1). And if any legacy be left him, he shall not reap the benefit of it, if, being duly admonished, he refuse the burthen (*i*). But the executors may pray time to advise, and the ordinary is to grant, in the mean time, letters ad colligend' (2). So the ordinary may grant administration in the mean time, till the executors prove the will (*k*); as during absence beyond sea (3), minority, or

(1) Godolph. Orph. Leg. part 1. c. 20. § 2, 3, 6. Wentw. Off. Exec. 36, 37. see *Read* v. *Devaynes*, 3 Bro. C. R. 95. *Abbott* v. *Massie*, 3 Ves. 148. *Anon.* Owen. 44.

(2) *Broker* v. *Charter*, Cro. Eliz. 92.

(3) *Slaughter* v. *May*, 1 Salk. 42. *Hodge* v. *Clare*, 4 Mod. 15. See also *Walker* v. *Wollaston*, 2 P. Wms. 578.

(*i*) That is, by the common law; for, by the civil law, an executor is entitled to his legacy, notwithstanding he refuse to prove the will; Owen, 44; and it has been held, that where an executor had shewn his intention to act in the execution of the will, but died before probate, that his representative should have the legacy; *Harrison* v. *Rowley*, 4 Ves. 212. But see *Harford* v. *Browning*, 1 Cox's Rep. 305. contra. But the executor may prove at any time, even after hearing of the cause. *Read* v. *Devaynes*, 2 Cox's R. 285.

(*k*) Temporary administration not being within the statute which prescribes to whom the administration shall be granted, the ordinary is not bound to grant it to the next of kin. *Briers* v. *Goddard*, Hob. 250. *Thomas* v. *Butler*, 1 Ventr. 219. As to the power of a temporary administrator, see *Walker* v. *Woollaston*, 2 P. Wms. 576, where the point is very fully discussed.

pendente lite (*l*); and a caveat is only concilium, but not præceptum. And an administrator durante minori ætate may do all things that an executor may; and he has more than the custody, for he has the property (*m*). Yet his release is not good, but for such things as he ought to release; and he is only a curator in the civil law, which is in the nature of a bailiff in our law, who hath no power over the estate, but only to sell bona peritura (4). And the court, ex officio, ought to take notice of the ecclesiastical law, when it is by that law determined.

(4) *Lord Grandison* v. *Countess of Dover*, Skin. 155.

(*l*) Whether administration could be granted pendente lite, appears to have been formerly doubted. See *Robin*'s case, Moore, 636. But see *Slaughter* v. *May*, 1 Salk. 42. Lutw. 242. 2 P. Wms. 583.

(*m*) When such administration ceases, see *Pigot*'s Case, 5 Rep. 29.

SECTION V.

BUT when one dies intestate (*n*), the ordinary had formerly power to grant the administration to whom he pleased (*o*). And, therefore, the ordinary might well make another, if the committee would not administer at all, or but in part; for he cannot compel one to administer; and then is the power of the

(*n*) By which must be intended, when one dies without having made a will, or without having named an executor; or, having named an executor, the person so named refuses to act; in all which cases, administration must be granted, with this difference, that in the first, the administration is general; in the two latter, the administration is cum testamento annexo. It appears, however, that, at a very early period, namely, by the statute of Westminster, the ordinary was bound to pay the debts of the intestate, so far as his goods would extend, in the same manner that executors were bound in case the deceased had left a will; a use more truly pious, (observes the learned commentator on our laws,) than any requiem or mass for his soul.

(*o*) As to the origin and extent of the ancient power of the ordinary in cases of intestacy, see 2 Bla. Com. c. 32. *Hensloe*'s case, 9 Rep. 36, b. *Offley* v. *Best*, 1 Sid. 370.

first determined, as a man may revoke his letter of attorney. For as a former will may be revoked by a latter one, by the law of the church, à fortiori may letters of administration (*p*). And a power or authority is revocable, as an administration; because he has nothing to his own use. Otherwise of an interest certain. But mesne acts executed shall stand, viz. If the administration was once lawfully granted, though not perhaps, where it was never good (*q*).

(*p*) If the ordinary ever possessed this power, it must have been prior to the 31 Edw. III. c. 11; for it seems generally admitted, that an administration once regularly granted, and the administrator acting, or willing to act under it, cannot be revoked. See Godolphin's Orph. Leg. part 2. c. 31. par. 4. *Elme* v. *Da Costa*, 1 Phill. 176, 177. *Billinghurst* v. *Vickers*, 1 Phill. 187. That probate of a will may be revoked, the supposed testator being alive; see *Napier*'s case, 1 Phill. 83. See also *Rymes* v. *Clarkson*, 1 Phill. 22.

(*q*) "Where there is a former administration regularly granted, all acts lawfully executed by the first administrator, as administrator, are good in law, and shall bind the next and succeeding administrators. For this reason it is, that if administration be granted to a stranger, and the next of kin sue to have it revoked, and the first administrator, (pendente lite,) during the suit, sell the goods on purpose to defeat the second administrator, and then the first administration

Yet, even in the first case, they may be avoided against creditors for covin, by the statute of 13 Eliz. (1). And if an administrator dies, his executors cannot meddle with his goods, but the ordinary must grant a new administration, &c. (2). And upon letters of administration shewn, we must judge

(1) *Packman's* case, 6 Rep. 18. b. Cro. Eliz. 459.

(2) Wentw. Off. Exec. 366. Swinb. part 6. § 3. 12. 1 Rol. Ab. 907. pl. 9.

happens to be revoked, and the administration to be committed to another, in case the second administrator cannot recover these goods, or have any remedy, unless the first suit for granting the administration were by appeal annulled; in which case, all that the first administrator did was void, and the second administrator, in such case, may recover all the goods the first administrator sold. Again, if the first administration be conditionally granted, all the acts which the administrator doth before the breach of the condition are good; so that the subsequent administrator cannot avoid any gifts or sales before such breach made by the said former conditional administrator. But suppose the bishop of a diocese doth, as he ought, grant letters of administration of the goods of an intestate, not having bona notabilia, to one, and the archbishop grant letters of administration of the same goods to another; in this case the effect of the first administration is suspended until the other be repaled by sentence. And if there be a will concealed, and thereupon administration is granted, after which it happens that the will is produced and proved; in this case the administration is determined, and all acts vacated which had been formerly done by such a surreptitious administrator." Godolph. part 2. c. 31. § 5.

according to their law; for it shall be intended, that they would not grant it against law. But although, by the civil law, the administrator was accountable as servant to the ordinary, and might be discharged by him, and a repeal might have been of the letters of administration at the ordinary's pleasure; yet, since the statute 21 H. VIII. cap. 5, the administration being duly committed by the ordinary, cannot now be repealed without cause, but a prohibition lies (3). So where at common law the ordinary was not compellable to grant administration at all, and also might grant it to whom they pleased; now they are compellable to grant it to the next of kin (*r*).

(3) *Offley* v. *Best*, 1 Sid. 370. *Price* v. *Parker*, 1 Lev. 157.

(*r*) Though by the statute of Westminster, "the goods of the intestate were made liable to the creditors of the intestate for their just and lawful demands, yet the residuum, after payment of debts, remained in their hands to be applid to whatever purposes the conscience of the ordinary should approve. The flagrant abuses of which power occasioned the legislature again to interpose, in order to prevent the ordinaries from keeping any longer the administration in their own hands, or those of their immediate dependants; and, therefore, the statute 31 Ed. III. c. 11. provides, that, in case of intestacy, the ordinary shall depute the nearest and most lawful friend deceased to administer his goods; which administrators are put upon the same footing

Nor is administration now esteemed like a letter of attorney, but is rather an office;

with regard to suits, and to accounting as executors appointed by will. This is the original of administrators as they at present stand, who are only the officers of the ordinary appointed by him. In pursuance of this statute, which singles out the next and most lawful friend of the intestate, who is interpreted to be the next of blood, who is under no legal disability; the statute 21 H. VIII. c. 5. enlarges a little more the power of the ecclesiastical judge."—2 Bla. Com. 495. In consequence of the above two statutes, 31 Edw. III. c. 11. and 21 H. VIII. c. 5. the ordinary is compellable—first to grant administration of the goods and chattels of the wife to the husband, or his representatives; *Johns* v. *Row*, Cro. Car. 106; *Squib* v. *Wyn*, 1 P. Wms. 382; and in case of his death, he having survived his wife, to his next of kin: And he is bound to grant administration of the husband's estate to the widow, or next of kin; but he may grant it to either, or both, at his discretion; *Fawtry* v. *Fawtry*, 1 Salk. 36. If administration be granted to two, both must join in any act that affects the estate; but upon the death of one, it will survive; *Hudson* v. *Hudson*, Forrester, 127. But see *Jacomb* v. *Harwood*, 2 Ves. 268.

2dly, Among the kindred, those are to be preferred that are the nearest in degree to the intestate; but of persons in equal degree, the ordinary may take which he pleases, 21 H. VIII. c. 5. That the wishes of creditors may be entitled to consideration, see *Warwick* v. *Greville*, 1 Phill. 127.

3dly, That this nearness or propinquity of degree shall be reckoned according to the computation of the

and administrators are enabled to bring actions in their own name, and come in the

civilians; *Mentney* v. *Petty*, Pre. Ch. 593; *Lloyd* v. *Tench*, 2 Ves. 215, and not of the canonists, which the law of England adopts in the descent of real estates: because in the civil computation the intestate himself is the terminus a quo, the several degrees are numbered, and not the common ancestor, according to the rule of the canonists: And, therefore, in the first place, the children, or, on failure of children, the parents of the deceased, are entitled to the administration; both which are, indeed, in the first degree; but with us the children are allowed the preference; then follow brothers, grandfathers; *Blackborough* v. *Davis*, 1 P. Wms. 40; *Woodroffe* v. *Wickworth*, Pre. Ch. 527; uncles, or nephews; *Durant* v. *Prestwood*, 1 Atk. 454; who must, as equally near, take per capita, and not per stirpes; and the females of each class respectively; and, lastly, cousins.

4thly, The half-blood is admitted to the administration as well as the whole, for they are of the kindred of the intestate, and only excluded from inheritance of land upon feodal reasons; therefore the brother of the half-blood shall exclude the uncle of the whole blood; and the ordinary may grant administration to the sister of the half, or the brother of the whole blood, at his discretion; *Croke* v. *Watt*, 2 Vern. 124. Show, P. C. 108.

5thly, If none of the kindred will take out administration, a creditor may, by custom, do it. *Blackborough* v. *Davis*, 1 Salk. 38. *Elme* v. *Da Costa* 1 Phill. 173.

6thly, If the executor refuse, or die intestate, the administration may be granted to the residuary legatee,

place of executors, as a new creature made by the statute; and therefore this office survives (4).

(4) *Adams* v. *Buckland*, 2 Vern. 514.

in exclusion of the next of kin; *Pierce* v. *Parks*, 1 Sid. 281; *Thomas* v. *Butler*, 1 Ventr. 219.

And, lastly, The ordinary may, in defect of all these, commit administration, as he might have done before the statute of Edward III. Plowd. 278, a. to such a discreet person as he approves of, or may grant him letters ad colligendum bona defuncti, which neither makes him executor nor administrator, his only business being to keep the goods in safe custody; and to do other acts for the benefit of such as are entitled to the property of the deceased.—If a bastard, (who has no kindred, being nullius filius) or any one that has no kindred dies intestate, and without wife or child, it has formerly been held, that the ordinary might seize his goods, and dispose of them in pious uses; but the usual course now is, for some one to procure letters patent, or other authority from the king, and then the ordinary of course grants administration to such appointee of the crown; *Manning* v. *Napp*, 1 Salk. 37. *Jones* v. *Goodchild*, 3 P. Wms. 33.

SECTION VI.

And the civil law, with respect to successions, was anciently very various and perplexed, till by the Novel Constitutions, 118. c. 1. it was settled and made plain; whence

the plan of the statute of distributions was taken (*s*) and penned by a civilian (*t*); and, except in some few particular instances

(*s*) Sir Wm. Blackstone, 2 vol. c. 32. is of opinion, that from the near resemblance which the statute of distribution, 22 and 23 Car. II. c. 10, bears to our ancient English law de rationabili parte bonorum, it ought to be considered as little more than a restoration, with some refinements and regulations, of our old constitutional law, which has prevailed as an established right and custom from the time of King Canute downwards, many centuries before Justinian's laws were known or heard of in the western parts of Europe. He acknowledges, however, that the doctrine and limits of representation, laid down in the statute of distribution, seem to have been principally borrowed from the civil law, whereby it will sometimes happen, that personal estates are divided per capita, and sometimes per stirpes; whereas the common law knows no other rule of succession but that per stirpes.

The occasion of making this statute of distribution was to put an end to the controversy betwixt the temporal and spiritual courts. The ordinary before took bonds from the administrator to make distribution, and those bonds were at law adjudged void, and the administrator entitled to all the personal estate. *Hughes and Hughes*, Carter's Reports, 152. 1 Lev. 233. One died intestate, leaving a considerable personal estate, and a son and a daughter; the son administered, and the daughter contended for a share in the spiritual court, where it was thought an hardship that the son should have all, and yet the daughter was prohibited at law. However, this statute of distribution takes away the

mentioned in the statute, is to be governed and construed by the rules of the civil law,

administrator's pretensions (which he before made with success) of retaining the whole; for, by the statute 22 and 23 Car. II. c. 10. it is enacted, that the surplusage of intestate's estates, except of femes coverts (which, by the 29th Car. II. c. 3. s. 25, are declared not to be within the 22 and 23 Car. II. c. 10,) shall, after the expiration of one full year from the death of the intestate, be distributed in the following manner: One third shall go to the widow of the intestate, and the residue in equal proportions to his children (in which description a posthumous child is included; *Wallis* v. *Hodgson*, 2 Atk. 115); or, if dead, to their representatives, that is, their lineal descendants: If there are no children or legal representatives, then a moiety shall go to the widow, and a moiety to the next of kindred, in equal degree, and their representatives; (as to who are the next of kin, see 1 P. Wms. 41. 2 P. Wms. 594. 1 Vern. 168. 233; see also Dick. Rep. 146); if no widow, the whole shall go to the children; if neither widow nor children, the whole shall be distributed amongst the next of kin, in equal degree, and their representatives; but no representatives are admitted among collaterals, farther than the children of the intestate's brothers and sisters; *Carter* v. *Crawley*, Raym. Rep. 496; *Pett* v. *Pett*, 1 Ld. Raym. 571. The next of kindred here referred to are to be ascertained by the same rules of consanguinity as those who are entitled to letters of administration; and therefore, by the statute, the mother, as well as the father, succeeded to all the personal effects of their children who died intestate, or without wife or issue, in exclusion of the other sons and daughters, the brothers and sisters of the deceased;

and not from the canon law. For the canon law, prohibiting marriage between

and so the law still remains with respect to the father. But, by the statute 1 Jac. II. c. 17, if the father be dead, and any of the children die intestate, without wife or issue, in the life-time of the mother, she, and the other children, or their representatives, shall divide his effects in equal portions; see 2 Bla. Com. c. 32; and, for a more particular detail of the manner of distribution, see Lovelace on Wills, ch. 3. s. 2. But it may be material to remark, that by the 5th section of 22 and 23 Car. II. c. 10, any child, other than the heir at law, who shall have an estate by the settlement of the intestate, or shall be advanced by the intestate, in his life-time, by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution shall be made, is excepted from such distribution. And it is also enacted, that if any child, other than the heir at law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his life-time by portion not equal to the share which will be due to the other children by such distribution as aforesaid, then so much of the surplusage of the estate of such intestate to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the life-time of the intestate, as shall make the estate of all the said children to be equal as near as can be estimated. But the heir at law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent or otherwise from the intestate.

relations (*u*) till after the fourth degree, that they might exclude as many as possible from the liberty of marriage within those

(*t*) Sir William Walker, 1 Lord Raymond, 574.

(*u*) An elegant and philosophic historian (Mr. Hume, Hist. of England, 4 vol. p. 101. oct. ed.) remarks, "That the natural reason why marriages within certain degrees, are prohibited by the civil law, and condemned by the moral sentiments of all nations, is derived from men's care to preserve purity of manners; while they reflect, that, if a commerce of love were authorized between near relations, the frequent opportunities of intimate conversation, especially during early youth, would introduce an universal dissoluteness and corruption. But as the customs of countries vary considerably, and open an intercourse more or less restrained between different families, or between the several members of the same family, we find that the moral precept, varying with its cause, is susceptible, without any inconvenience, of very different latitude in the several ages and nations of the world. The extreme delicacy of the Greeks permitted no communication between persons of different sexes, except where they lived under the same roof; and even the apartments of a step-mother and her daughter were almost as much shut up against visits from the husband's sons as against those from any stranger or more distant relation. Hence, in that nation, it was lawful for a man to marry not only his niece, but his half sister by the father—a liberty unknown to the Romans and other nations, where a more open intercourse was authorized between the sexes." As to the degrees of kindred prohibited from intermarriage, see 2 Burn's Eccles. Laws, 407.

degrees without a dispensation, reckon all in the direct ascending or descending lines, and those in the collateral line corresponding with them, to be but one degree (1). And it is said, the ecclesiastical court very anciently made distribution of intestates' estates long before the act of parliament, viz. of 22 Car. II., nor were they prohibited till the reign of King James I. And the prohibition was grounded on the statute of 21 H. VIII., which directs the ordinary to grant administration to the next of kin; for, when that was done, they had executed their authority. But where the words in the act of parliament are, "to distribute according to the laws for that purpose, and rules, in the act aforementioned;" the word "laws" must relate and be intended of ecclesiastical laws, and the usage in the spiritual court before that time practised. And there is no doubt now, that the half-blood shall have administration; even an alien of the half-blood is capable (2). As to the words in the act, providing that no representation be admitted amongst collaterals after brothers' and sisters' children, these are to be understood of the brothers and sisters of the intestate; for the intestate

(1) *Metney* v. *Petty*, Pre. Ch. 593.

(2) *Crook* v. *Watts*, 2 Vern. 124. Show. Parl. Ca. 108. and the cases there cited.

is the subject of the act, it is his estate, his wife, his children—and by the same reason his brother's children, he being plainly the correlative to all(3). But the statute being made upon a presumption, that the intestate intended to prefer the next of kin, when there is a residuary legatee, that presumption is taken away (4): and therefore he shall have the administration, whether assets or not.

(3) *Pett* v. *Pett*, 1 L. Raym. 571. Comyn's Rep. 87. 1 P. Wms. 25. *Bowyers* v. *Littlewood*, 1 P. Wms. 594. *Maw* v. *Harding*, 2 Vern. 233. *Carter* v. *Crawley*, Raym. Rep. 496.

(4) *Thomas* v. *Butler*, 1 Ventr. 219. *Pierce* v. *Parks*, 2 Sid. 281.

CHAP. II.

Of the Payment of Debts.

SECTION I.

BUT executors shall have only such chattels as the testator had to his own use (*a*). And regularly estates of inheritance, or of freehold (*b*) descendible, shall go to the heir; and the statute of 29 Car II. cap. 3, makes the estate pur auter vie assets only to pay creditors (*c*), for it is still a freehold,

(*a*) As to what shall be deemed the personal estate of the testator, see 2 Bac. Ab. 418.

(*b*) So also copyholds pur auter vie; *Rundle* v. *Rundle*, 2 Vern. 265.

(*c*) The statute of frauds makes an estate pur auter vie devisable; and enacts, that if it be not devised, and there be no special occupant, it shall devolve on the executors and administrators of the party that had the estate, and shall be personal assets in their hands: so that whether an estate pur auter vie, not devised, be real or personal assets, depends upon there being or not being a special occupant; see *Westfarling* v. *Westfarling*, 3 Atk. 466. *Atkinson* v. *Baker*, 4 Term Rep. 229. *Ripley* v. *Waterworth*, 7 Ves. 425; but Q. whether an estate pur auter vie, though no special occupant

and not distributable (*d*). Yet whatever comes to the executors' hands, or they are intrusted with as executors (1), shall be assets at law (*e*). And legal assets, although

(1) *Girling* v. *Lee*, 1 Vern. 63. *Graves* v. *Powell*, 2 Vern. 248. *Anon.* 2 Vern. 405. *Clutterbuck* v. *Smith*, Pre. Ch. 127. *Bickham* v. *Freeman*, Pre. Ch. 136. *Dethwicke* v. *Caravan*, 1 Lev. 224. *Burwell* v. *Corrant*, *Hard.* 405. *Lord Masham* v. *Harding*, Bunb. 339. *Blatch* v. *Wilder*, 1 Atk. 420. *Westfarling* v. *Westfarling*, 3 Atk. 466.

were named, would not be held real assets if devised. As to terms attendant on the inheritance, see page 118, 119.

(*d*) Estates pur auter vie, in case there be no special occupant thereof, and not devised according to the stat. of frauds, are now, by 14 Geo. II. c. 20. s. 9. after payment of debts, distributable in the same manner as the personal estate of the testator or intestate. Whether copyhold estate pur auter vie be within it, see *Withers* v. *Withers*, Ambl. 181. As to proceeding under the Stat. 6 Ann, c. 18, to compel production of cestuy que vie, see 2 Cox's R. 273.

(*e*) The cases referred to in the margin proceeded upon the principle of law, that whatever the executor takes qua executor, or in respect of his executorship, shall be considered as legal assets. But there are cases, in which courts of equity, adverting to the circumstance of the devisee being a trustee of the real estate, as well as executor, have considered the real estate, as a purely trust fund, distributable according to the principles of equity; which, aiming at equality, are favourable to equitable assets. *Anon.* 2 Vern. 133. *Challis* v. *Casborn*, Pre. Ch. 408. *Chambers* v. *Harvest*, Mosely, 123. *Hall* v. *Kendall*, Mosely, 328. *Lewin*

you cannot come at them without the assistance of equity (*f*), shall be applied in a

v. *Oakley*, 2 Atk. 50. *Batson* v. *Lindegreen*, 2 Bro. Ch. Rep. 94. And the circumstance of the devise not being to the executor expressly upon trust, or in trust, or as a trustee, will not vary the rule; if there be enough in the will to convert the executor into a trustee, as if the devise be to him and his heirs; for the money could never be assets in the hands of the executor's heir, nor could the creditor even maintain his action against such heir. *Silk* v. *Prime*, 1 Bro. Ch. Rep. Addenda, p. 7. See also *Newton* v. *Bennett*, 1 Bro. Ch. Rep. 135, and *Barker* v. *Boucher*, there cited, 140. But, if the executor has a merely naked power to sell qua executor, quære, whether the assets are legal or equitable? See *Silk* v. *Prime*, and *Newton* v. *Bennett*. It has, however, been determined, that where an estate descends to the heir, charged with the payment of debts, it will be legal assets. *Fremoult* v. *Dedire*, 1 P. Wms. 430. *Plunkett* v. *Penson*, 2 Atk. 290. *Young* v. *Dennet*, Dick. Rep. 452. The authority of those determinations is, however, materially weakened, if not destroyed, by the decisions in *Hargrave* v. *Tindal*, July 9, 1753, 1 Brown's Ch. Rep. Addenda, p. 6, and in *Batson* v. *Lindegreen*, 2 Bro. Ch. Rep. 94. *Beiby* v. *Ekins*, 7 Ves. 319. *Shiphard* v. *Lutwidge*, 6 Ves. 26. So that every thing may be considered as equitable assets which the debtor has made subject to his debts generally, and which, without his act, would not have been subject to his debts generally.

(*f*) Therefore, if a mere trust estate descend on the heir at law, though it may be necessary to come into equity to reduce it into possession, yet it will be con-

course of administration (2): Otherwise, where you raise assets where there were none in law (g). Yet, even there, real securities shall be first satisfied, and then the debts by bond and simple contract to be paid in average; for any other method would become impracticable. And the rule is, where there are legal and also equitable assets, the creditors, who will take

(2) *Wilson* v. *Fielding*, 2 Vern. 763, 764. Case of *Sir Charles Cox's Creditors*, 3 P. Wms. 342. 1 Rolle's Rep. 56.

sidered as legal, and not as equitable assets, such trust estate being made assets, not by the act of the party but by statute. And if *A.* mortgage for years, and the reversion in fee be in him, it will be legal assets. *Countess of Warwick* v. *Edwards*, Dick. Rep. 51. But an equity of redemption of a mortgage in fee, being a merely equitable interest, and not made assets by any legislative provision, will, therefore, be considered as equitable assets. *Plunkett* v. *Penson*, 2 Atk. 294. So if a termor for years mortgage his term, the equity of redemption will be equitable assets. Case of *Sir Charles Cox's Creditors*, 3 P. Wms. 342. *Hartwell* v. *Chitters*, Ambl. 308.

(g) From the cases referred to in the preceding notes (e), (f), it may be collected, that assets are considered as equitable, either in respect of the intent of the testator, or of the nature of the testator's interest in the property. In the first case, as already observed, the charge upon the real estate must be for the payment of debts generally, and in the latter case, the interest of the party in the property must be a purely equitable interest, and not made legal assets by any statute.

their satisfaction out of the legal assets, shall have no benefit of the equitable assets, till the other creditors, who can only be paid out of those assets, have received out of them an equal proportion of their respective debts (3); and wherever the testator's intent appears, the lands shall be liable, without express words, to the payment of his debts (4). And so far are creditors favoured, that if the profits will not raise the sum in a convenient time, they may sell (5).

(3) *Sheppard* v. *Kent*, 2 Vern. 435. *Deg.* v. *Deg.* 2 P. Wms. 417. *Haslewood* v. *Pope*, 3 P. Wms. 323. *Morrice* v. *Bp. of England*, Forrest. 220.

(4) *Newman* v. *Johnson*, 1 Vern. 45. *Trott* v. *Vernon*, Pre. Ch. 430. *Beachcroft* v. *Beachcroft*, 2 Vern. 690. *Harris* v. *Ingledew*, 3 P. Wms. 91. *King* v. *King*, 3 P. W. 358. *Hatton* v. *Nichol*, Forrest. 110. *Earl of Godolphin* v. *Penneck*, 2 Ves. 271. *Kidney* v. *Coussmaker*, 2 Ves. Jun. 266. *Kightly* v. *Kightly*, 2 Ves. Jun. 328. *Williams* v. *Chittey*, 3 Ves. 545. *Shallcross* v. *Finden*, 3 Ves. 738. (5) See b. 1. c 6. § 18.

SECTION II.

THE course and order of payment of debts by an executor at law is, 1st, (*h*) Debts due

(*h*) Our author has omitted to notice the right of the executor, in the first place, to pay funeral and testamentary charges. Wentw. Off. of Exec. ch. 12. p. 129. 2 Bla. Com. 511; see as to legacies for mourning, *Lane* v. *Hobbs*, 24th July 1805.

to the king upon record; 2dly, Judgments obtained in a course of justice in adversary suits against the testator (*i*), although by mere confession, and without defence in any court of record (1); and, of two judgments, he who sues first must be preferred (2); but, before, it is at the election of the executor to pay which he will first, only a judgment in a foreign country (*k*), as France, is to be considered but as a simple contract (3); and a decree in this court (*l*) is equal to a judgment at law (4);

(1) Went w. Off. of Ex. 12. p. 131, 135. *Harrison's* case, 5 Rep. 28. b.

(2) *Smallcomb* v. *Cross*, 1 Ld. Raym. 251.

(3) *Duplein* v. *De Roven*, 2 Vern. 540.

(4) *Searle* v. *Lane*, 2 Vern. 89. *Peploe* v. *Swinburne*, Bunb. 48. *Morrice* v. *Bank of England*, Forrest. 217. *Bishop* v. *Godfrey*, Pre. Ch. 179. *Darston* v. *Earl of Orford*, Pre. Ch. 188. 3 P. Wms. 402. in a note.

(*i*) It may be material to remark, that this priority does not extend to judgments obtained against or confessed by the executor, Off. of Ex. 137; nor to judgments not docketted pursuant to the 4 & 5 W. & M. c. 20. *Hickey* v. *Hayter*, 6 Term Rep. 384; nor will a judgment though docketted prevail against debts which, by particular statutes, are to be preferred to all others; as the forfeitures for not burying in woollen, 30 Car. II. c. 3; money due from overseers of the poor, 17 G. II. c. 38; for letters to the post office, 9 Anne, c. 10, and some others.

(*k*) See *Walker* v. *Witter*, Doug. Rep. 1, where the point is fully considered.

(*l*) This is too generally stated; for though a final decree be equal to a judgment at law, in the course of

but, if the decrees passed by default, he may contest the reality of the debt (5). 3dly, Statutes or recognizances: and of these, whoever getteth first hold of the goods in execution shall be preferred; but, before, the executor may give preference to which he will (6); but neither of these, before they are broken, do take place of specialties (7): 4thly, Specialties by bond or bill; and of such specialties, that is to be preferred whose time of payment is already come, especially if it be demanded (8); but, in equal degree, he may pay himself first (*m*), and any stranger, notwithstanding

(5) *Searle* v. *Lane*, 2 Vern. 88.

(6) Wentw. Off. of Ex. 138.

(7) *Harrison's* case, 5 Rep. 28 b.

(8) Wentw. Off. of Ex. 142, 241.

administration of assets, see *Darston* v. *E. of Oxford*, Pre. Ch. 188; 3 P. Wms. 402; *Morrice* v. *Bank of England*, Forrest. 217. *Smith* v. *Stiles* 2 Atk. 384; *Brooks* v. *Reynolds*, 1 Bro. C. R. 183. *Martin* v. *Martin*, 1 Ves. 211. *Douglas* v. *Clay*, Dick. 393. *Perry* v. *Phelips*, 10 Ves. 34; and though an executor or administrator shall not be allowed for debts paid after a decree to account, but in taking the account must stand in the place of the creditors he has paid, *Jones* v. *Jukes*, 2 Ves. jun. 518; yet it is not equal to a judgment, so as to affect the lands of the debtor. *Astley* v. *Powis*, 1 Ves. 496. *Bligh* v. *Earl of Darnley*, 2 P. Wms. 621.

(*m*) In æquali jure potior est conditio possidentis, is the principle upon which the executor's right of retaining is founded, according to the opinion of some (vide Wentworth's Office of Ex. 142.): but according to Sir

a verbal demand (*n*), if no suit be commenced; and if several suits are commenced, he who first hath judgment must be first satisfied. But between a debt by

Wm. Blackstone, it is grounded upon this reason, that the executor cannot, without an apparent absurdity, commence a suit against himself as representative of the deceased, to recover that which is due to him in his own private capacity; 3 Bla. Com. p. 18. Yet one executor shall not be allowed to retain his own debt, in prejudice to that of his co-executor in equal degree, but both shall be discharged in proportion. 11 Viner's Ab. tit. Exec. (D. 2.) That an executor may not retain his own legacy, see *Butler* v. *Wallis*, 2 Freem. 134. *Hardy* v. *Freelove*, 7 Aug. 1800, Rolls. *Gilbert* v. *Whitmarsh*, V. C. July 1818. Administration to a creditor is generally granted on condition that he claims no preference in respect of the administration. See *Backhouse* v. *Hunter*, 1 Cox's R. 342.

(*n*) It may be material to observe, that, of debts of record, the executor must take notice at his peril; *Searle* v. *Lane*, 2 Vern. 88; but, as to debts due by bond, or other specialties, although the law requires that debts shall be paid according to their priority, yet it seems that an executor may pay a debt on a simple contract before a specialty, if he have no notice of such specialty; for otherwise it might be in the power of the obligor to ruin the executor, by keeping his bond in his pocket until the executor had paid away all the assets in discharging simple contract debts. See *Britton* v. *Bathurst*, 3 Lev. 115. *Hawkins* v. *Day*, Dick. 155.

obligation, and a debt for rent, or damages upon a covenant broken, there seems to be no difference; that is a rent behind at the time of the testator's death. And if the testator died a few days before the rent became due, it would not make it the executor's debt, for the rent issues from the profits. But if the lessor distrain for the rent arrear, the executor cannot plead fully administered, as if debt had been brought. Nor can the distress be taken after in execution upon a judgment or statute of the testator's, although replevied; because it is but in the case of a prisoner bailed, who is still in some sort in custody of the law. Also, the land is chargeable with distress from the very making of the lease, and the rent is a debt of a real nature, and so superior to personal debts; and they were found levant and couchant upon the lands; so that if they had been an under-tenant's or stranger's cattle, they might have been distrained (*o*). Lastly, assumptions (*p*) or

(*o*) See Wentworth's Office of Executor, where the law upon this point is very ably stated.

(*p*) Among simple contracts, Sir William Blackstone observes, that servants are, by some, with reason, preferred to any other; and so stood the ancient law, ac-

promises before legacies, or the reasonable part of the wife or children, to which by custom in some countries, they are entitled; for it concerns the soul of the testator to have all duties and debts to others, æs alienum, satisfied, before voluntary gifts or bequests (9). And legacies are gratuities and no duties, and therefore an action will not lie at common law for the recovery of a legacy (*q*). But legacies shall be paid, notwithstanding any covenant not actually broken, for a covenant is no duty till it is broken, and it shall be presumed it will not (10). Now what is said of the right method or order of payment of debts, discovereth how and by what means an executor may waste them; and so much he hath still in right, according to the rule, pro possessore habetur qui dolo vel injuria

(9) Wentw. Off. of Ex. 155.

(10) 1 Rolle Abr. 928.

cording to Bracton and Fleta, who reckon, among the first debts to be paid, servitia servientium, et stipendia famularum. 2 Com. 511. Whether small legacies for mourning are not, as to legatees, to be first paid, see *Lane* v. *Hobbs*, 24 July 1805.

(*q*) See *Atkins* v. *Hill*, Cowp. 284. Buller, Ni. Pri. 131, in which it is held, that an action would lie upon promise by an executor to pay a legacy; but in *Deeks* v. *Strutt*, 5 Term Rep. 690, it was held that such an action would not lie.

(11) Wentw. Off. of Ex. 165.

desiit possidere (11); and, therefore, he has still the same advantage of preferring which creditor he will, in equal degree, as aforesaid. But if there be no particular motives from the nature of the debts or legacies, or the circumstances of the parties, in foro conscientiæ he ought to pay every one in proportion, and let the loss be equal. And so was the civil law, and the ancient law of this realm, excepto domini regis privilegio fiat ubique defalcatio; and by the law of God, they shall be bound to do what is most profitable for the soul of the testator.

SECTION III.

But the executor may retard one action (r), and confess judgment to another subsequent action, and, in some cases, is obliged

(r) An executor may retard an action by legal delays, as imparlance and essoins, &c. to prefer one creditor before another; but he may not do it by false pleading of what lieth in his own knowledge; otherwise if a falsity lie not in his own knowledge, as non est factum testatoris; *Parker* v. *Dee*, 2 Ch. Ca. 200, 201

to confess judgment for his own defence, and plead (*s*) such judgment to other actions then depending: otherwise if several actions should come to be tried at the same time, he might be doubly charged, and obliged to answer the value of the assets twice over. But a voluntary payment made after an original filed, or bill exhibited (*t*) shall not be allowed. Yet

(*s*) If the executor do not plead a prior judgment, but allow the plaintiff in the depending action to obtain judgment by default, or otherwise, and there be no assets to satisfy the subsequent judgment, the executor will, in an action on such judgment, suggesting a devastavit, be chargeable therewith. *Rock* v. *Layton*, 1 Ld. Raymond, 589. *Skelton* v. *Hawlins*, 1 Wils. 258. See *Terrewest* v. *Featherby*, 2 Meriv. 480; as to judgment, de bonis propriis, against an executor,—— v. *Thacker*, Ch. 24 Feb. 1819.

(*t*) So held by Lord Keeper Wright, in *Darston* v. *Earl of Orford*, Pre. Ch. 188; upon the authority of several adjudged cases; *Bright* v. *Woodward*, 1 Vern. 369; *Joseph* v. *Mott*, Pre. Ch. 79; but the decree was reversed in the House of Lords, principally because the debts were of equal degree: And a decree of the court of Chancery cannot be pleaded at law to an action brought against an executor upon another debt of equal degree; see 3 P. Wms. 401 (F.) But though a decree cannot be pleaded at law, yet it is now settled that a decree in the court of Chancery as to administration, is equal to a judgment at law. If, therefore, a

even in the case of a voluntary payment, if the suit at law be not by original but for the purpose upon a latitat, out of the King's Bench, there a voluntary payment shall stand good, though after the action brought (1); for the latitat, supposing a trespass, gives no notice of a debt; and so of a subpœna out of the Exchequer (2). But the bringing of a bill in equity is not stronger nor can bind the assets more than the bringing of an original at law; and therefore a judgment confessed by the executor to a bond creditor suing at law (*u*)

(1) *Goodfellow* v. *Burchett*, 2 Vern. 300. *Waring* v. *Danvers*, 1 P. Wms. 295.
(2) Wentw. Off. of Ex. 144.

decree have a real priority in point of time, and not by fiction and relation to the first day of term, it will be preferred in the order of payment to subsequent judgments; and the judgment-creditor will be restrained from proceeding at law against the executor. *Morrice* v. *Bank of England*, Forrest. 217; see also *Joseph* v. *Mott*, Pre. Ch. 79; *Harding* v. *Edge*, 1 Vern. 143; *Brooks* v. *Reynolds*, 1 Bro. 183; *Martin* v. *Martin*, 9 Ves. 211; *Smith* v. *Eyles*, 2 Atk. 385.

(*u*) It may be proper here to observe, that if the executor find the affairs of his testator so complicated as not to allow of his safely administering his estate, he may institute a suit against the creditors for the purpose of having their several claims arranged by the decree of the court. *Buckle* v. *Atleo*, 2 Vern. 37. But such bill will not entitle him to an injunction to restrain any creditor from proceeding against him at law; it

after the bill brought in this court by the plaintiff, who was also a bond creditor, shall be allowed upon account (3). But a judgment voluntarily confessed by an executor, pending a bill here, shall not be allowed upon an account of assets (4).

(3) *Goodfellow v. Burchett*, 2 Vern. 300.

(4) *Surrey* v. *Smalley*, 1 Vern. 457. 1 Eq. Ca. Ab. 240.

being necessary for such purpose, that there be a suit or decree, under which the creditor can establish his debt. *Rush* v. *Higgs*, 4 Ves. 641.

SECTION IV.

And it is the duty of an executor to pay the testator's debts; therefore, if he pays them with his own money, &c. the testator becomes indebted to him in the like sum (1). For it is but reasonable, when a man pays money lawfully, that he should be paid again, and because the same hand is to pay and receive, so that he cannot have an action against himself for the debt; therefore he may retain (2) so much

(1) *Robinson* v. *Tonge*, 3 P. Wms. 400. *Briers* v. *Goddard*, Hob. 250.

(2) *Claydon* v. *Spenser*, Mo. 2.

of testator's goods, and pay himself (*v*). So if an executor with his own money redeem a pledge of the testator's for the full value, the property is immediately changed by the redemption, and it is not assets in his hands; for this seems a sort of selling it to himself (3); but otherwise, if for less than the value; the surplus is assets in his hands. So if a specific legacy, as three gowns, &c. is devised, and the legatee takes money in satisfaction of them, this amounts, first, to a consent of the executor to the legacy, and then it is at the same instant a sale by the legatee to the executor for the money.

(2) Keilw. 63. Off. of Ex. 77.

(*v*) For the same reason, among debts of equal degree, an executor may retain the amount of his debt. *Cock* v. *Goodfellow*, 10 Mod. 496; as to an administrator's retaining his debt, see p. 407 note (*m*).

CHAP. III.

Of making an Account.

SECTION I.

BUT all equal laws of every well-governed commonwealth have favoured the execution of testaments and last wills of men deceased, and have taken special care that they should not be frustrated. And surely, if it be agreeable to reason, that stewards, receivers, bailiffs, guardians, factors, and such as have to deal for other persons, should be accountable of their several offices, with greater reason may it be maintained, that an executor ought to be subject to account; for they for the most part have to deal for such as are living, who may have an eye to what they do: but an executor is intrusted for a dead person, who is totally ignorant of it, if his executor deal unjustly. Besides, from the care and caution that is taken, as well by the civil as the ecclesiastical law, in making inventories, we may learn the ne-

cessity of making of an account; for if executors were not accountable (*a*), the use of inventories were to little purpose. The end for which this account is required is, that the will may be fully accomplished; and therefore all that have interest are to be cited to be present at the making of it, as the creditors and legatees, otherwise the account shall not be prejudicial to them (1).

(2) Swinburne, part 6. § 17.

(*a*) The stat. of H. VIII. (21 H. VIII. c. 1. § 4.) does not require the presence of all persons interested at the making of the inventory, but of two at the least; and provides for the absence of all persons interested, by requiring, in such case, the presence of two credible persons. See upon what terms a court of Equity will restrain proceedings upon the bond to the ordinary to account, &c. *Thomas* v. *Archbishop of Canterbury*, 1 Cox's Rep. 399.

SECTION II.

And if we respect what is to be performed by the executor, who maketh the account, he is not only to declare what goods and chattels belonging to the testator (*b*) he hath

(*b*) As to what things are to be put in the inventory, see 4 Burn's Ecclesiastical Law, 253.

received, and what debts and legacies he hath paid for the testator, and to make due proof of every payment, that is to say, of lesser sums by his oath, and of greater sums by other proofs, such as the ordinary shall allow of; but also if any thing do remain of the said goods and chattels, the funerals, together with the debts and legacies being satisfied and discharged, the same ought to be employed and disposed of in pios usus (*c*). Neither ought the executor, by the ecclesiastical law, to apply any part thereof to his own private use, more than is given him by the testator, or which the ordinary shall allow him for his labour, or for the like consideration, *viz.* honest, moderate, and not sumptuous expences, according to the condition of the person (1). And for strictness, no funeral charges are allowed against a creditor, except for the coffin, ringing the bell, parson, clerk, and bearers' fees; but not for pall or ornaments (2). But, by the common law, although an executor was compellable to account before the ordinary, and so was an administrator; yet the ordinary was to take the account as given in, and could not oblige them

(1) Swinburne, part 6. § 20.

(2) *Shelly's* case, 1 Salk. 296.

(*c*) This notion has been long exploded.

to prove the items of it, nor swear the truth of them (*d*.) So it was if a creditor sued in

(*d*) It appears that executors and administrators were, by stat. Edward III. bound to account before the ordinary; but the ordinary was to take the account as given in, for he could not oblige them to prove the items of it, or to swear to the truth of it. Neither could a creditor falsify such account in the ecclesiastical court, for his remedy was at common law; *Bellamy* v. *Alden*, Noy's Rep. 78; but a legatee might falsify such account, as may the next of kin, since the statute of distribution. *Archbishop of Canterbury* v. *Willis*, 1 Salk. 315. By the 21 H. VIII. c. 5. § 4, executors and administrators are, however, bound to deliver to the ordinary an inventory of the effects of the deceased, upon oath, if thereunto lawfully required. But the truth of this inventory cannot be controverted in the ecclesiastical court; *Hinton* v. *Parker*, 8 Mod. 168. *Catchside* v. *Ovington*, 3 Burr. 1922; but see Swinb. pt. 6. § 20, who observes, that if, upon examination of the account, it doth appear that the executor hath not dealt faithfully, the account is to be rejected. As to when an administrator is to account, the condition of administration-bonds, since the statute of distribution, being, that he will account at a day certain, he must account accordingly, and that without citation or suit; and this account must be in court; see *Archbishop of Canterbury* v. *Willis*, 1 Salk. 316. *Greenside* v. *Benson*, 3 Atk. 248. The jurisdiction of the ecclesiastical court, being so evidently defective in the case of creditors, has rendered it necessary for them to resort to courts of equity, which not only require the executor or administrator to swear to his account, but also allow the creditor to contest it, and

the ecclesiastical court; for he had a proper remedy at common law. But otherwise, if a legatee had sued for an account, or the next of kin, who is a legatee by the statute of 22 Car. II. of distribution, for the legatee had no other remedy. Yet, in such case, if the executor would pay him, he could not sue further, for he had right done him, and the executor was not liable, but of necessity that right might be done (3).

(3) *Archbishop of Canterbury*, v. *Willis*, 1 Salk. 316.

when the debt is established, if there be assets, decrees its payment. And as legatees are not entitled to payment of legacies until all debts are paid; and as the payment of debts cannot be enforced in the ecclesiastical court, it is now become the usual course for legatees to seek payment of their legacies by suit in equity, as do also the next of kin for distribution of an intestate's estate, there being no words in the statute of distribution to exclude the jurisdiction of a court of equity in the case of an intestacy; *Matthews* v. *Newby*, 1 Vern. 134; and the spiritual court not having jurisdiction in cases where there is a will, and the residue undisposed of. *Petit* v. *Smith*, 5 Mod. 247. Lord Raymond, 86. see also b. 4. part 1. c. 1. § 2. As to executors withdrawing out of the jurisdiction of our courts, and temporary administration to be granted thereon, see *Raynsford* v. *Taynton*, 7 Ves. 460.

SECTION III.

An executor de son tort is, where a stranger assumes the office of an executor, by performing some acts (*e*) which are proper to an executor, as by paying himself or other creditors with the goods of the deceased, or by taking them into his possession (1); for he must not be his own carver, because of the great inconvenience and confusion that would ensue if every creditor should strive to satisfy himself first. And he cannot take advantage of his own wrong, as to retain for his debt. But all lawful acts that a wrongdoer does are good (2). Yet regularly it cannot be said administration, unless he does what an administrator ought to do; as by employing them for the testator's use, for the good of his soul. And where there is one executor of right, who

(1) Swinburne, part 6. § 22, Godolphi. part 2. c. 8. Wentw. Off of Ex. 171. *Read*'s case, 5 Rep. 33. b.

(2) 4 Rep. 30. b. Wentw. Off. of Ex. 179, 180.

(*e*) Doing acts of necessity or humanity, as locking up the goods, or burying the deceased, or feeding his cattle, will not amount to such an intermeddling as will charge a man as executor of his own wrong; 2 Bla. Com. 507. Godolph. pt. 2. c. 8. § 3. As to what intermeddling will so charge a person, see Wentw. Off. of Ex. chap. 14. See also *Orr* v. *Newton*, 2 Cox's R. 274.

proves the will, another shall not be executor of his own wrong by construction of law (*f*). But if he claims in such case to be executor, there, because of such express administering as executor, he may be charged as executor of his own wrong, though there be another executor of right (3). In case of intestacy, there is this diversity taken, if *H.* gets goods of an intestate into his hands after administration is actually granted, it does not make him executor of his wrong (*g*): But if he gets the goods into his hands before, though administration be granted afterwards, yet he remains chargeable, as a wrongful executor; unless

(3) Wentw. Off. of Ex. 175. *Read's* case, 5 Rep. 33 b.

(*f*) Except where the goods taken by him never came to the executor, but were in a remote part; in which case he becomes executor; for as it were mischievous to the executor if he should, by possession in law, cast upon him, stand chargeable with those goods in a remote place purloined, as assets in his hands; so were it as mischievous to creditors, if neither executor by right, nor this stranger, as an executor by wrong, should stand liable to creditors for them. Off. of Ex. 175, 176.

(*g*) Unless the administration be obtained collusively by means of the person having the goods; in which case, the 43 Eliz. ch. 8. charges the person having the goods, c. of the intestate, as executor de son tort.

he delivers the goods over to the administrator before the action brought, and then he may plead plene administravit; and if he takes upon him to act as executor, he is chargeable at all events (4) (*h*).

(4) *Anon.* 1 Salk. 313.

(*h*) I cannot conclude this chapter, which treats upon a subject of the most extensive and important concern, without recommending to the reader to avail himself of the advantage which the learning and industry of Mr. Gwillim affords him in his new edition of Bacon's Abridgment,—title Executors and Administrators.

BOOK THE FIFTH.

Of Damages and Interest.

CHAP. I.

Their Nature.

SECTION I.

SINCE a man is bound in equity, not only to perform his engagements but also to repair all the damages that accrue naturally from the breach of them, we ought not to omit treating of these, and especially of interest, which is the most frequent of all, it being the common measure, where the contract is for money, though in its own nature more incertain than any other. But it is now fixed to a certain portion of the sum lent; for, to cut off the infinite variety of liquidations and law-suits which might be occasioned by the non-payment of money, it was absolutely necessary to settle,

by a law, an uniform reparation for all the sorts of damages arising thence (*a*). But there was, besides, a natural reason, which made this regulation as equitable as it was useful to the public; for the damages which proceed from other causes do all spring from some engagement, which points out the nature of the loss, if he fails to perform it, and determines precisely the quality of the reparation to be made. But, in the case of those who owe money, it is otherwise. And debtors being all obliged to one and the same thing, the respective damages which the creditors may suffer are accidents they could not foresee, nor are obliged to answer; so that they are all bound only to the same reparation of damages; and this could not be made more just or more cer-

(*a*) Domat, from whom our author appears to have extracted the whole of this section, has, vol. 1. b. 3. tit. 5. most fully and ably considered the subject; and, as the disquisition would much exceed the province of a note, I must beg to recommend his observations to the perusal of those who wish for a more particular view of the reason of the difference stated between interest of money and other damages. The reader will also find his industry abundantly requited in extending his researches to the reasoning of Pothier upon the same subject. Traité des Obligations, partie 1. ch. 2. art 3.

tain, than by fixing it at the value of the common profits that may be made of money by a lawful commerce (*b*). As for damages

(*b*) Domat remarks, that "this has been done by comparing money, which makes the price of all things, to those things which produce naturally some profit; and by regulating the profits of a sum of money according to the profit that is made of a thing of like value; and seeing the most ordinary and natural profits are those which lands yield, the reparation of damages, which ought to be paid to creditors in sums of money, who are not paid at the time of payment, is estimated at the rate of the usual produce or revenue of a piece of land of the same value with the sum that is due." That the market-price of lands depends on the market-rate of interest, and that the market-rate of interest is materially influenced by the value of land, is certainly true; but I apprehend that it is not wholly and precisely determined by it. "The ordinary price of land, (says Dr. Adam Smith, in his Wealth of Nations, a work of deservedly the highest reputation,) it is to be observed, depends every where upon the ordinary market rate of interest. The person who has a capital, from which he wishes to derive a revenue, without taking the trouble to employ it himself, deliberates whether he should buy land with it, or lay it out at interest; the superior security of land, together with some other advantages, which almost every where attend upon this species of property, will generally dispose him to content himself with a smaller revenue from land than what he might have by lending his money out at interest. These advantages are sufficient to compensate a certain difference of revenue,

in general, the measure of them is to be taken from the quality of the action, the cause and the event (*c*). For, where there is any fraud or knavish dealing, the sentence ought to have the utmost extent that the rigour of the law can give it; because the knavery implies a will and intention to do all the hurt that was possible. But,

but they will compensate a certain difference only: and if the rent of land should fall short of the interest of money, by a greater difference, nobody would buy land, which would soon reduce its ordinary price; on the contrary, if the advantages should much more than compensate the difference, every body would buy land, which again would soon raise its ordinary price." B. 2. c. 4. Whence it appears that the legal rate of interest should be something above what money would produce if laid out in land. With respect to the proportion which it ought to bear to the common profits of trade, to which our author, upon the authority of Domat, seems to think it ought to be equal, I shall again refer to Dr. Adam Smith: "Interest is the compensation which the borrower pays to the lender for the profit which he has an opportunity of making by the use of the money; part of that profit naturally belongs to the borrower, who runs the risk, and takes the trouble of employing it; and part to the lender, who affords him the opportunity of making this profit." B. 1. c. 6.

(*c*) Pothier has stated a variety of cases illustrative of this position; see also Domat, vol. 1. b. 3. tit. 5. s. 2.

where there was nothing unfair, we ought to distinguish the events ensuing from the fact; which are to be imputed to him as author of it, and such as flow from other causes (1); for the general rule is, that no man is to be answerable for accidents, except there be some fault on their part (2).

(1) Domat's Civ. Law, b. 3. tit. 5. § 1. Pothier Traité des Obligations, partie 1. c. 2. art. 3.

(2) Domat's Civ. Law, vol. 1. b. 1. tit. 1. § 3, 9.

SECTION II.

Now, while the Roman commonwealth stood, no interest could be demanded for the debtor's delay of payment, unless some advance was agreed upon by contract. But some lawyers having introduced a custom chiefly in matters of companies, the emperors enlarged it to all contracts bonæ fidei (1), without exception, as also to legacies and trusts. Yet in contracts of rigorous right, there must always be an agreement in form, or nothing is due, though a process be entered. And thus it is plain, that interest was not esteemed by

(1) Dig. lib. 22. tit. 1. 32. Cod. lib. 4. tit. 32.

them as any natural produce, but given only in certain cases to recompense the delay of payment: Yet it seems, vicem fructuum sustinere, and is allowed in Chancery, not only upon a note payable upon demand (2), but even for demands due by covenant, notwithstanding the objection (*d*) that they

(2) *Osborn* v. *Hosier*, 6 Mod. 167.

(*d*) Compensation for breach of covenant lying in damages, and interest not being recoverable, ratione damnorum, but only ratione detentionis debiti; *Sweatland* v. *Squire*, 2 Salk. 623; the objection to the case referred to appears to me at least entitled to further consideration.

That interest is not allowed in equity, (though it may be allowed at law, in the shape of damages, see *Eddowes* v. *Hopkins*, Dougl. 361); on book or simple contract debts, prior to the confirmation of the master's report of such debts, though the real estate be devised for payment of debts; see *Dolman* v. *Pritman*, 3 Ch. Rep. 36; *Barwell* v. *Parker*, 2 Ves. 363; *Earl of Bath* v. *Earl of Bradford*, 2 Ves. 587; *Lloyd* v. *Williams*, 2 Atk. 108; *Shirley* v. *Lord Ferrers*, 1 Bro. Ch. Rep. 41; but see *Carr* v. *Countess of Burlington*, 1 P. Wms. 226; *Maxwell* v. *Wettenhall*, 2 P. Wms. 27, contra. and *Craven* v. *Tickell*, 1 Ves. jun. 63; in which last case Lord Thurlow, C. stated it to be the constant practice at law, either upon the contract or in damages, to give interest upon every debt detained. *Grosvenor* v. *Cook*, Dick. 305. Whether the creation of a trust for such purpose by deed, or whether the nature of the fund, as a term, will vary the rule, see *Shirley* v. *Lord*

were not liquidated, and found only in damages (3). However, a difference has been taken in case of goods sold and delivered

(3) *Parker* v. *Harvey*, 14 Vin. Abr. 458. pl. 16.

Ferrers. That contracts in writing to pay on a certain day or on demand, will carry interest, see *Lowndes* v. *Collins*, 17 Ves. 27. That interest is not generally allowed on rents and profits, or on arrears of an annuity; see *Ferrars* v. *Ferrars*, Forrest. 2, 3; *Micklethwaite* v. *Boatman*, 1 Ch. Rep. 97; *Batten* v. *Earnly*, 2 P. Wms. 163; *Drapers' Company* v. *Davis*, 2 Atk. 211; *Sir John Robinson* v. *Cumming*, 2 Atk. 411; *Bedford* v. *Coke*, Dick. 178; *Bignal* v. *Brereton*, Dick. 278; *Tew* v. *Lord Winterton*, 1 Ves. jun. 451. Nor on arrears of maintenance, see *Mellish* v. *Mellish*, 14 Ves. 516. That interest will be allowed on the arrears of an annuity, if secured by a recognizance, or other specialty; see *Legat* v. *Sewal*, Gilb. Rep. 142; *Newman* v. *Awling*, 3 Atk. 579; or if the annuitant has been by injunction prevented from recovering it, see *Morgan* v. *Jones*, Dick. 643. That it will be allowed on judgment debts, see *Parker* v. *Harvey*, 14 Vin. Ab. 458. pl. 15. 3 Bro. P. C. 187; or on simple contract debts, &c. from the time of confirming the master's report, if there be much delay, see *Shirley* v. *Lord Ferrers*, 1 Bro. Ch. Rep. 41. *Lloyd* v. *Baldwyn*, Dick. 139. But see *Cruse* v. *Lowth*, 2 Ves. jun. 157, where the subject is very fully considered, and it is determined that neither the judgment unless founded on a debt carrying interest, or secured by a penalty, nor a demand found by the master's report, though confirmed, shall carry interest, except under particular circumstances. See *Quarles* v. *Knight*, Exch. 15 July 1819. That in some cases interest will be allowed on children's portions before they are payable, see *Greenhill* v. *Waldoe*, Pre. Ch. 367; *Beale* v. *Beale*, Pre. Ch. 405.

between bare notes and penal securities; because in the former (4), the parties have not extended the bargain beyond the bare sum in the note; but in the latter, although there was a profit in the sale, yet the court will not dispossess him of the security without a common amends, i. e. the common interest for the time of his forbearance; for the penalty is presumed, without any agreement for that purpose, to be inserted for that end. But where excessive rates are allowed for the work, in respect of slow payments, there shall be no interest allowed; for interest is only allowed to supply the want of prompt payment (5). And whenever the debt is carried beyond the penalty of the security, it is always for a defendant, upon the maxim that he who will have equity must do it; as where the party has been delayed by injunction of this court (6), or the like (*e*). But never

(4) 2 Com. Dig. tit. Chancery. (3 § 4.)

(5) *Duchess of Marlborough* v. *Strong*, 14 Vin. Ab. 458. pl. 11. 2 Bro. P. C. 500.

(6) *Hale* v. *Thomas*, 1 Vern. 349. *Duvall* v. *Terrey*, Show. P. C. 15.

(*e*) As where an estate be devised in trust for creditors, and the trustee neglects to pay in a reasonable time; *Anon.* 1 Salk. 154; or the obligee has obtained a judgment for the penalty; *Awdley* v. ——, Hard. 136; *Godfrey* v. *Watson*, 3 Atk. 517. See also *Duvall* v. *Price*, Show. Parl. Ca. 15, and the cases referred to in marg. But, unless there be some special circum-

for a plaintiff, any further than he could charge him at law; because he has chosen his own security, and therefore must abide by it. Besides, a man can have no more than his debt, and the penalty is the utmost of the debt(7). Nor will equity ever carry interest beyond the penalty, where there has been no demand of several years (8). But where a bond is only a collateral security, interest may be carried beyond the penalty (9). And so where advantage is made of the money, interest shall be carried beyond the principal (10).

(7) *Steward* v. *Rumball*, 2 Vern. 509. *Jevan* v. *Bush*, 1 Vern. 342. *Grosvenor* v. *Cook*, Dick. 305. *Tew* v. *Ld. Winterton*, 3 Bro. Ch. Rep. 492. *Knight* v. *Maclean*, 3 Bro. Ch. Rep. 496. *Clarke* v. *Seton*, 6 Ves. 411.

(8) *Mayor*, &c. *of Galway* v. *Russell*, 14 Vin. Ab. 459. pl. 2. 2 Bro. P. C. 275.

(9) *Kirwin* v. *Blake*, 14 Vin. Ab. 460. pl. 4. 2 Bro. P. C. 383.

(10) *Lord Dunsany* v. *Plunkett*, 14 Vin. Ab. 460. pl. 3. 2 Bro. P. C. 251.

stances in the case, the rule stated by our author seems most agreeable to the current of authority. There are, however, cases in which the penalty has been exceeded, without special circumstances. See *Elliott* v. *Davies*, Bunb. 23; *Lord Lonsdale* v. *Church*, 2 Term. Rep. 388. *Clarke* v. *Ld. Abingdon*, 17 Ves. 106.

SECTION III.

As to the time when the interest shall commence, it seems regularly to begin from the delay of payment. In the civil law, if that which is due proceeds from a cause, which, in its own nature, produces no revenue, the interest of it will be due only after the debt has been demanded in a court of justice (1); but those who retain money in their hands, and convert it to their own use, without the consent of the owners, are bound to pay interest (*f*), although it be not demanded, as a punishment for their knavish dealing (2). And, in our law, if the legatee be of full age, he shall have interest only from the time of his demand after the year; for, no time of payment being appointed, it is not payable but upon demand (g). But, in the case of an infant,

(1) Domat's Civ. Law, vol. 1. b. 3. tit. 5. § 1, 5.

(2) Domat's Civ. Law, vol. 1. b. 3. tit. 5. § 1, 8.

(*f*) Courts of equity proceed upon this principle in charging executors and trustees with interest on trust property. See b. 2. c. 7. s. 6.

(g) The time of demand appears to have been formerly the time from which interest was to run; but this is irreconcileable with the later decisions, which have

it is otherwise because no laches can be imputed to him; and the law dispenses with the demand in his favour, because of the impotence and weakness of his age (3),

(3) *Smell* v. *Dee*, 2 Salk. 415.

followed the distinctions taken by Lord Macclesfield in *Maxwell* v. *Wettenhall*, 2 P. Wms. 26; which are, if one gives a legacy charged upon land which yields rents and profits, and there is no time of payment mentioned in the will, the legacies shall carry interest from the testator's death, because the land yields profits from that time; see *Stonehouse* v. *Evelyn*, 3 P. Wms. 253. But if a legacy be given, charged upon a dry reversion, here it shall carry interest only from a year after the death of the testator, a year being a convenient time for a sale. If a legacy be given out of a personal estate, and no time of payment mentioned in the will, this legacy shall carry interest only from the end of the year after the death of the testator; see *Lloyd* v. *Williams*, 2 Atk. 108; *Beckford* v. *Tobin*, 1 Ves. 308; *Bilson* v. *Saunders*, Bunbury, 240; *Wood* v. *Penoyre*, 13 Ves. 333. *Rourke* v. *Ricketts*, 10 Ves. 333; otherwise, if maintenance be directed, *Beckford* v. *Tobin*, or the legacy be to a legitimate child, *Lowndes* v. *Lowndes*, 15 Ves. 301; not so as to a wife, *Stent* v. *Robinson*, 12 Ves. 461. Quære as to tenant for life, *Sitwell* v. *Barnard*, 6 Ves. 520. But if the personal estate consist of mortgages carrying interest or stock yielding profit, it was formerly held that the legacy should carry interest from the death of the testator; but see *Gibson* v. *Bott*, 7 Ves. 89, which explodes the distinction, and determines that in all cases of legacy, interest shall be allowed only from the end of a year after the testator's death.

But where a certain legacy is left payable at a certain day, it must be paid with interest from the day (4); because it is the will of the testator that the executor should tender it: Yet some think, even in that case, a legacy ought to carry interest but from the time of a demand made, though it is otherwise of a debt (5). But a present legacy charged upon a reversion, expectant upon an estate for life, shall carry interest from the death of the testator (*h*); and a demand would be fruitless, the legacy not being in the hands of the executor, but only charged on the reversion (6.) But interest may sometimes commence even before the time of payment: as if a father limits or devises portions to his daughters or younger children, to be paid, or payable, at their respective ages of twenty-one years, or any other certain time, without making any other provision for their maintenance in the

(4) *Palmer* v. *Trevor*, 1 Vern. 261.

(5) *Jolliffe* v. *Crew*, Pre. Ch. 161. *Knapp* v. *Powell*, Pre. Ch. 11.

(6) *Atkins* v. *Dawbury*, Gilb. Rep. 88. 1 Eq. Ca. Ab. 46. pl. 9.

If a legacy be brought into court, and the legatee have notice of it, so that it is his fault not to pray to have the money, or that the money should be laid out, the legatee, in such case, shall lose the interest from the time the money was brought into court; but, if the money was laid out, the legatee shall have the interest which it has yielded.

(*h*) *Qu.* See *Maxwell* v. *Wettenhall*, 2 P. Wms. 26; but see also *Lloyd* v. *Williams*, 2 Atk. 108.

mean time (*i*), and dies; in this case they shall have interest for their portions from his death (7), till paid; because the father, if he had lived, was obliged, by the laws of God and nature, to have provided for them (*j*): Otherwise, in case of such a provision by a stranger, who was under no such obligation; because it was a mere bounty in him, and therefore shall be carried no further than he has appointed it (*k*).

(7) *Attorney General* v. *Thompson*, Pre. Ch. 337. *Anon.* 2 Ventr. 346. *Green* v. *Belcher*, 1 Atk. 507. *Hearle* v. *Greenbank*, 3 Atk. 716. *Incledon* v. *Northcote*, 3 Atk. 438. *Greenhill* v. *Waldoe*, Pre. Ch. 367.

(*i*) That if the child be otherwise provided for, this court will not allow interest, see *Long* v. *Long*, in a note to *Mitchell* v. *Bower*, 3 Ves. 286; or be not an infant, *Rodin* v. *Waite*, Rolls, 12 June, 1818; or if the parent has limited the time when interest is to be allowed. *Lomax* v. *Lomax*, 11 Ves. 48.

(*j*) The moral obligation of the father is not the only ground for this distinction; for though the father is under a moral obligation to provide for his illegitimate children, yet an illegitimate child is not allowed interest by way of maintenance before his legacy is payable; *Beckford* v. *Tobin*, 1 Ves. 310; but see *Crickett* v. *Dolby*, 3 Ves. 12, in which case the Master of the Rolls said, that a natural child was entitled to interest on a legacy; neither shall a grandchild; *Butler* v. *Freeman*, 3 Atk. 58; *Palmer* v. *Mason*, 1 Atk. 505; *Haughton* v. *Harrison*, 2 Atk. 329; *Crickett* v. *Dolby*, 3 Ves. 10. See also *Greenwell* v. *Greenwell*, 5 Ves. 194, and *Buckworth* v. *Buckworth*, 1 Cox's R. 80. But see

Hill v. *Hill*, 3 Ves. & B. 183. *Cavendish* v. *Mercer*, 5 Ves. 195, there cited; and as to the distinctions between legacies which shall carry interest or not, see *Shawe* v. *Cunliffe*, 4 Bro. 144; *Wyndham* v. *Wyndham*, 3 Bro. 58. *Winch* v. *Winch*, 1 Cox's Rep. 433.

(*k*) See *Heath* v. *Perry*, 2 Atk. 101, and the cases referred to by Mr. Sanders in a note.

SECTION IV.

And it has generally been laid down as a rule, both in the civil law and in Chancery (1), that interest should not be allowed upon interest. But this has some exceptions: And, 1st, A mortgagee of mortgage forfeited shall have interest for his interest (*l*); at least as to so much interest as

(1) God. lib. 4. tit. 32, 28.

(*l*) In 1 Ch. Ca. 258, it is noted, that, a little before Michaelmas term (1674), the Lord Keeper (Finch) declared it should be the rule, that a mortgagee whose mortgage was forfeited should have interest for his interest, and should only be accountable for what profits he should receive, and not for what he might have received, unless there were fraud; but this rule does not appear to have prevailed in any case, and is directly against the decision of many. See *Proctor* v. *Cooper*, Pre. Ch. 116.

was reserved in the body of the mortgage deed, that shall be reckoned principal; for it being ascertained by the deed, an action of debt will lie for it; and, therefore, it is but reasonable that there should be damages given for the non-payment of that money. And although it is objected, that, if this were to be established for a rule, every scrivener would reserve all his interest half yearly, from time to time, as long as the interest should be continued out upon security, which would make all mortgages pay interest upon interest; yet it is certain there is a clear distinction between debt and damages, and it does not appear that any inconvenience will arise from this doctrine; it will only serve to quicken men to pay their just debts (2). But where there was a deed to let the mortgagee into possession, and enlarge the time of redemption, in which deed was mentioned what was due for principal and interest, the interest then due shall not carry interest, there being no express agreement that such interest should carry interest, and the whole sum due being mentioned for another purpose (3). 2dly, It is, without all question, that this rule does not extend to a third

(2) *Howard* v. *Harris*, 2 Vern. 190, 1248, 2 Ch. Ca. 147.

(3) *Brown* v. *Barkham*, 1 P. Wms. 652.

person, who pays interest for a debtor to his creditor; for the same, with respect to him, is a principal sum lent (*m*). And, therefore, it has always been the rule in Chancery (*n*), that the mortgagee assigning, the assignee should have interest for the interest then due (*o*); and so all money really paid by the assignee, that was due to the mortgagee, shall be principal to the assignee. But the account between the mortgagee and assignee is not to conclude the mortgagor, but the Master is to see what was really due at the time of assignment, and whether he actually paid the money; for if the assignment was colourable, it would be otherwise (4); and, therefore,

(4) *Smith* v. *Pemberton*, 1 Ch. Ca. 67, 68. *Chamberlain* v. *Chamberlain*, 1 Ch. Ca. 258. *Gladman* v. *Henchman*, 2 Vern. 135.

(*m*) So held for a surety paying debt for his principal; *Morley* v. *Cleaves*, 2 Keb. 376; but *quære*, whether the rule extends to payment by a stranger, without the concurrence of the debtor?

(*n*) This rule does not appear to have been generally known in the time of Lord Keeper North. See *Earl of Macclesfield* v. *Fitton*, 1 Vern. 169; see also *Matthews* v. *Wallwyn*, 4 Ves. 118.

(*o*) In the case of *Montague* v. *Ratcliffe*, 5th June 1706, it was held, that the assignee of the first mortgage having notice of the second mortgage should not turn interest into principal.

some have thought (5) that interest should not be made principal, in such case, unless the mortgagor had joined in the assignment (*p*). 3dly, A stated (*q*) account ought to carry interest (6), especially in cases of mortgages, and more strongly when settled by a master of the court (*r*) pursuant to

(5) *Porter* v. *Hubbart*, 3 Rep. Ch. 43.

(6) *Blaney* v. *Hendrick*, 2 Bla. Rep. 761. *Barwell* v. *Parker*, 2 Ves. 365.

(*p*) And such appears to be now the general rule subject, however, to such distinctions as particular circumstances may require; *Ashenhurst* v. *James*, 3 Atk. 270.

(*q*) This position is true as to accounts regularly stated by and between the parties, in which case there is an implied contract on the part of the debtor to pay; but does not extend to cases where there is no settlement or acknowledgment by the debtor; *Boddam* v. *Riley*, 2 Bro. Ch. Rep. 3.

(*r*) The report of the Master will not, however, entitle the creditor, whether mortgagee or otherwise, to interest before it be confirmed; *Kelly* v. *Lord Bellew*, 1 Br. Pa. Ca. 202; *Attorney General* v. *Brewer's Company*, 1 P. Wms. 377; see *Creuse* v. *Hunter*, 2 Ves. 157. But when confirmed, the whole amount will carry interest, though part of it be in respect of costs; *Bickman* v. *Cross*, 2 Ves. 471. Whether the interest will carry interest as against a second mortgagee, see *Digby* v. *Craggs*, 2 Eden's R. 200.

Quære, Whether an infant mortgagee, being defendant, shall be charged with interest upon interest? See *Bennett* v. *Edwards*, 2 Vern. 392. Pow. on Mort. ch. 13.

order (7); and so interest shall be decreed for the yearly balance of a renewing account (8).

(7) *Butler* v. *Duncombe*, 1 P.Wms. 453. *Bacon* v. *Clarke*, 1 P. Wms. 480. *Brown* v. *Barkham*, 1 P. Wms. 653. *Neal* v. *Attorney General*, Mosely, 246. *Astley* v. *Powis*, 1 Ves. 496. *Bickham* v. *Cross*, 2 Ves. 471. (8) *Ashton* v. *Smith*, 14 Vin. Ab. 458. pl. 14.

That mortgagee in possession holding over after payment of his principal and interest shall be charged, with interest on the balance in his hands. See *Quarrell* v. *Beckford*, 1 Maddock's Rep. 269.

SECTION V.

But it is said that damages are in the power of the court; and, therefore, they usually order them as they see convenient: As if lands are limited, upon failure of issue male, to the daughters of the marriage, and their heirs, until the next remainder-man shall pay them 3,000*l.* there being four daughters only who entered, the rents in this case shall not be applied, first, to pay interest, and then to sink the principal, as in case of a common mortgage, but with this variation, that the principal shall not be sunk till a third part

is raised above the interest, and so again, when another third part is raised (1). So an account ought to be taken with an annual rest, each year's account to carry interest, in cases where it is of a trustee, who has paid off incumbrances with his own money, arrears of annuities, and old mortgages. On the other side, where the case is very hard, as the principal sums paid for maintenance of younger children to the grand-mother, being allowed in the House of Lords towards the sinking of her jointure, the court here would not let them be applied at the time when they were paid, but in one entire sum at the end of the account, and so struck off all the interest for above sixteen years, which came to more than the principal (2). So where, by marriage articles, the lady's father was to pay several sums at several times, for discharging the husband's incumbrances, he advances money to the son-in-law, and maintains the wife and child for two years; such money allowed for maintenance shall be added to the foot of the account, and shall not carry interest (*s*) (3).

(1) *Blagrave v. Clunn*, 2 Vern. 523.

(2) *Lady Dacres v. Shute*, 1 Vern. 160.

(3) *Kirwan v. Blake*, 2 Bro. P. C. 333.

(*s*) The instances in which the court has exercised its discretion in allowing a greater or less rate of in-

terest than 4*l.* per cent. which is the usual allowance, are too many and various to allow of enumeration, *Lewis* v. *Freeke*, 2 Ves. jun. 507. The following instances may, however, serve as illustrative of the considerations by which this discretionary power is usually regulated. When interest is allowed upon a legacy, in respect of the fund upon which it is charged being productive, the rate of interest shall abate if the produce of the fund be not sufficient to answer the usual allowance; *Stonehouse* v. *Evelyn*, 3 P. Wms. 253; *Lord Trimlestown* v. *Colt*, 1 Ves. 277. When a legacy is given with interest, the court distinguishes between interest to be satisfied out of the proceeds of real estate, from interest which is to be satisfied out of a money fund, the profits of a money fund being in general greater than the profits on land; *Beckford* v. *Tobin*, 1 Ves. 311; *Moore* v. *Moore*, 3 Atk. 402; see also *Guillam* v. *Holland*, 2 Atk. 434. The court will also distinguish between the rate of interest charged by the contract of the parties, and the rate of interest to be charged on interest turned into principle, by the course of the court; *Astley* v. *Powis*, 1 Ves. 497.

With respect to the mode in which a court of equity will assess damages arising from a breach of covenant, &c. sometimes it will direct an issue *quantum damnificatus*, and, in some cases it will refer the consideration to a master. See *Denton* v. *Stewart*, 4th July 1786; see also decree in *Cudd* v. *Rutter*, as stated by Mr. Cox from the Register's Book, 1 P. Wms. 572.

SECTION VI.

As to the measure of the computation of the interest, it is to be observed, 1st, That contracts are to be adjudged, according to the law of the place where such contracts are made (*t*), and therefore, in all cases,

(*t*) This point is most elaborately investigated by Huber, Prælectiones, 2 tom. lib. 1. tit. 3. de conflictu legum, who remarks, that though from the anciently almost universal jurisdiction of Rome, the Roman law does not touch upon the subject, yet the fundamental rules which must govern it are to be extracted from that system; by which it was held: "1. Léges cujusque imperii vim habent intra terminos ejusdem reipublicæ, omnesque ei subjectos obligant, nec ultra. 2. Pro subjectis imperio habendi sunt omnes qui intra terminos ejusdem reperiuntur, sive in perpetuum sive ad tempus ibi commorentur. 3. Rectores imperiorum id comiter agunt, ut jura cujusque populi, intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicetur. Ex quo liquet hanc rem non ex simplici jure civili, sed ex commodis et tacito populorum consensu esse petendam." That learned writer, having illustrated the above general rules by a variety of cases, proceeds, "Verum tamen non ita præcise respiciendus est locus in quo contractus est initus, ut si partes alium in contrahendo locum respexerint, ille non potius sit considerandus. Nam contraxisse unusquisque in eo

interest must be paid according to the law of the country where the debt was contracted (*u*), and not according to that where

loco intelligitur, in quo ut solveret, se obligavit." Upon this exception to the above general rules, Lord Mansfield appears to have founded his decision in *Robinson* v. *Bland*, 2 Burr. 1077. see also *Campbell* v. *French*, 3 Ves. 323. and *Hunter* v. *Potts*, 4 Term Rep. 182; *Alves* v. *Hodgson*, 7 Term Rep. 242. See Lord Kaim's Principles of Equity, B. 3. c. 8. s. 4.

But it may be material to remark, that the above exception has not been allowed in cases to which it might seem immediately applicable; as in *Stapleton* v. *Conway*, 3 Atk. 727, in which Lord Harwicke is reported to have said, that "if a contract is made in England for a mortgage of a plantation in the West Indies, no more than legal interest shall be paid upon such mortgage; and if, in such case, there is a covenant in the mortgage for payment of 8 per cent, it would be within the statute of usury, notwithstanding this is the rate of interest where the land lies." The objection which occurred in the above case is now indeed done away by stat. 14 Geo. III. c. 79. But the interference of the legislature for such purpose does of itself afford a degree of strength to the principle of the decision; for if such contract, having relation to the law of the country in which the property was situate, was of itself valid, such legislative interference was unnecessary; and that it was unnecessary, I am aware, is the opinion of some highly respectable authorities; but their opinion seems opposed by the judgment of B. R. in the case of *Span* v. *Dewar*, 3 Term. Rep. 425. See *Raymond* v. *Brodbelt*, 5 Ves. 199.

the debt is sued for (1). So where one living in England devises a rent-charge out of his estate in Ireland, it shall be reckoned

(1) *Ekins* v. *East India Company*, 1 P. Wms. 396. 2 Bro. P. C. 72. *Bodily* v. *Bellamy*, 2 Burr. Rep. 1094.

It is also requisite, to give a binding force to a contract entered into in another country, that it does not violate the rights of persons not parties to it. "Effecta contractuum certo loco initorum, pro jure loci illius alibi quoque observantur, si nullum inde civibus alienis creetur prejudicium in jure sibi quæsito." Huber. Prælec. ubi supra. To this qualification of the rule may be referred those cases in which courts of justice refuse to enforce contracts entered into abroad, which, though there valid, or either violatory of some moral duty, or inconsistent with a positive right derived to a third person, under the law of the country in which such inconsistent claim is sought to be made available; in which case the rule is "magis est in tali conflictu ut jus nostrum quam jus alienum servemus." Another exception to the general rule, that the law of the place in which the contract is made shall prevail, is drawn from the nature of immoveable property. "Fundamentum universæ hujus doctrinæ diximus esse, & tenemus, subjectionem hominum infra leges cujusque territorii quamdiu illic agunt, quæ facit, ut actus ab initio validus aut nullus, alibi quoque valere aut non valere non nequeat. Sed hæc ratio non convenet rebus immobilibus; quando illæ spectantur, non ut dependentes a liberâ dispositione cujusque patris familias, verum quatenus certæ notæ lege cujusque reipublicæ ubi sitæ sunt illis impressæ reperiuntur; hæ notæ manent indelebiles in ista republica quicquid aliarum civitatum leges aut privatorum dispositionis secus aut contra

according to the English value, the will being made here. So Turkish and India Interest is allowed upon contracts made there, though both parties have been long in England. Yet it is but reasonable, where the money is to be paid here, that the party should have an allowance for the return of it (2). 2dly, The statute in 1660 respects only subsequent contracts; so that if a mortgagor before the statute, continues paying interest above 6*l. per centum*, no *inde-*

(2) *Earl of Dungannon* v. *Hackett*, 1 Eq. Ca. Ab. 288, 289. *Phipps* v. *Earl of Anglesea*, 1 P. Wms. 696, 5 Vin. Ab. 209, pl. 38. *Wallis* v. *Brightwell*, 2 P. Wms. 88. *Pierson* v. *Garnett*, 2 Bro. C.R. 38. *Malcolm* v. *Martin*, 3 Bro. 50. *Sanders* v. *Drake*, 2 Atk. 464. *Boddam* v. *Riley*, 2 Bro. 2.

statuant; nec enim sine magnâ confusione præjudicioque reipublicæ ubi sitæ sunt res soli, leges de illis latæ dispositionibus istis mutari possent." Hub. ubi supra. And accordingly we find that a disposition of land in England by a will made abroad, must, to be effective in England, have all the solemnities prescribed by the law of England. *Coppin* v. *Coppin*, 2. P. Wms. 293. *Alves* v. *Hodgson*, 7 Term Rep. 241. See also *Sill* v. *Worswick*, 1 H. Bla. 665. But that money of a forigner in the public funds is not distributable according to the law of England, see *Thorne* v. *Watkins*, 2 Ves. 35, and the cases there referred to.

(*u*) But the court will not decree interest upon interest, by reason of a custom in a foreign country in which the contract was entered into. *Boddam* v. *Riley*, 2 Bro. Ch. Rep. 3.

bitatus assumpsit will lie at law for the overplus (3); nor is there any just grounds to decree it in equity, it being voluntarily paid, and the contract not being changed or varied. But if the mortgagee enters, he shall be allowed interest, but after the reduced rate of 6*l.* per centum. And so it is agreed, that the statute of 12 Anne, cap. 16, which reduces the interest of money to 5*l.* per centum, has no retrospect, but interest shall be paid, as it was at the time of the contract.

(3) *Walker* v. *Penry*, 2 Vern. 42, 78, 145.

BOOK THE SIXTH.

Of Evidence.

CHAP. I.

Of Witnesses and Proofs.

SECTION I.

But as it is not sufficient to have a right in equity, unless we can make this appear by some outward proof to the court, in order to obtain relief, we must of necessity treat also of the qualification of witnesses, and the nature of evidence (*a*), lest our

(*a*) There is no branch of jurisprudence more interesting, and none more difficult of investigation, than the law of evidence. We have indeed several treatises upon the qualification of witnesses, the nature of the proof required, and the order of producing it; but those works, (particularly Mr. Phillips's,) though valuable, are very far from perfect. Indeed the nature of

discourse should seem maimed and imperfect. But we do not here intend to speak

the subject scarcely allows of its being resolved into system; we may collect and generalize the ideas which are to be found upon it; we may give them a degree of precision by rule, but cannot give to them that comprehension which is necessary to system; and indeed, when we reflect that the evidence to be allowed by law should be suited to the habits, opinions, and the state of society, we cannot but expect its rules to vary with the varying exigencies of the subjects to which it is to accommodate itself. Thus we find that, as occasions have arisen in which the rigid application of the rule would have caused a failure of justice, the rule has given way to the occasion: for "all general rules touching the administration of justice must be so understood as to be made consistent with the fundamental principles of justice, and consequently all cases, when a strict adherence to the rule would clash with those fundamental principles, are to be considered as so many exceptions to it." Foster's Crown Law, 38, and as remarked by Sir Dudley Rider, in the case of *Omichund* v. *Barker*, 1 Atk. 29, if exceptions were not allowed to general rules in relation to evidence, it were better to demolish the general rules: General rules of evidence may therefore be considered as afforded by the decisions of certain cases, and entitled to govern all cases similar in circumstances: but, if other circumstances belong to the case, the principle of the rule must be consulted; and if the principle does not reach such additional circumstances, it should seem that the rule ought not to be applied, if a failure of justice may be apprehended from its application.

of these in general, but so far as they are used in this court (*b*). Now in determin-

(*b*) In considering the authority of general rules, it is material to distinguish those which are drawn from the depths of reason, and the strict observance of which is essential to the attainment of truth, from those which are founded on notions purely of convenience, and which may be considered as merely modal and assistant, rather than essential to such object: such are those general rules which respect the order of proceeding, &c.

Our author has stated some general rules with reference to the qualification of witnesses; but it may be material to state, in addition to those which respect the qualification of the witnesses, those which respect the nature of their evidence, for though they are generally thrown together, I apprehend them to be in their nature extremely distinct: Thus, when evidence is rejected as hearsay, it is rejected not on the ground of any disqualification in the witness, but that the nature of his testimony, though it be true, does not afford that degree of proof of which the fact may allow. The first general rule is, that you must give the best evidence that the nature of the thing is capable of: "The true meaning of this rule is, that no such evidence shall be brought that ex naturâ rei supposes still a greater evidence behind in the parties' possession or power, for such evidence is altogether insufficient, and proves nothing, as it carries a presumption with it contrary to the intention for which it is produced; for if the other greater evidence did not make against the party, why did he not produce it to the court? as if a man offer a copy of a deed or will, where he ought to produce the original; this carries a presumption with it, that

ing the qualifications of witnesses, equity follows the law (*c*); and it seems the chan-

there is something more in the deed or will that makes against the party, or else he would have produced it, and therefore the proof of a copy in this case is not evidence; but if he prove the original deed or will in the hands of the adverse party, or to have been destroyed without his default, a copy will be admitted, because then such copy is the best evidence, the presumption of greater evidence behind in the parties' possession being overturned by positive proof." Buller's Ni. Pri. 293. Gilb. Law of Evid. 4, 5.

The next general rule is, that hearsay is no evidence, for no evidence is to be admitted but what is upon oath; and if the first speech were without oath, another oath that there was such speech, makes it no more than a bare speaking, and so of no value in a court of justice; besides, if the witness be living, what he has been heard to say is not the best evidence. To this general rule, that hearsay is not allowed as evidence there are several exceptions:

1st, Though it is not allowed as direct evidence, yet it may be admitted in corroboration of a witness's testimony, to shew that he affirmed the same thing before on other occasions, and that he is still consistent with himself; for such evidence is only in support of the witness that gives in his testimony upon oath. Gilb. L. of Evi. 150. Buller's Ni. Pri. 294: But this evidence is said not to be evidence in chief, and that it is doubtful whether it is so in reply. Espinasse's Ni. Pri. 784.

2dly, Where positive proof is not to be had, the declaration of persons uninterested, and who are then dead, are admissible, as in questions concerning legiti-

(1) Prac. Reg. 350. *Manning* v. *Lechmere.*

cellor cannot do otherwise. (1). And therefore if a man be rendered infamous

macy, or in questions of pedigree. Buller's Ni. Pri. 294. As to declarations of a parent, see proceedings on the Berkeley peerage, House of Lords, 1811; *Whitelocke* v. *Baker*, 13 Ves. 511; *Gordon* v. *Gordon*, Rolls, 17th Dec. 1816.

3dly, Hearsay is good evidence to prove the death of any relation beyond sea. Buller's Ni. Pri. 294.

4thly, Hearsay is evidence in cases of settlement of paupers. See Espinasse's Ni. Pri. 785, and the cases there referred to.

5thly, Hearsay is evidence whether parcel or not parcel. *Davies* v. *Pearce*, 2 Term Rep. 53.

6thly, In questions of prescription, hearsay is good evidence in order to prove a general reputation.

7thly, What commences by parol may be transmitted by parol, and that creates a general reputation, in which case hearsay is admissible evidence: and on this head Mr. Espinasse remarks, that it is in general to be observed that it is no objection to the admission of hearsay evidence, that the party whose declarations are brought as hearsay evidence would not himself be an admissible witness, provided such declarations at the time were indifferent, and used with reference to the question then before the court. Ni. Pri. 787.

The above exceptions to the general rule which excludes hearsay evidence, are strongly illustrative of the wisdom of our jurisprudence in making its rules subservient to the exigencies of occasion, in order to prevent a failure of justice.

in law, as by an infamous judgment (*d*), or has not discretion (*e*) and understand-

The next general rule respecting what may be given in evidence is, that parol evidence, though not admissible to contradict a deed, is admissible to explain a latent ambiguity in any instrument; see Lord Bacon's Max. Reg. 25, where this rule is fully considered; see also B. 1. c. 6. s. 11. note (*z*).

Another general rule is, that in all cases where general character or behaviour is put in issue, evidence of particular facts may be admitted, but not where it comes in collaterally, Esp. Ni. Pri. 788, and the cases there referred to. With respect to several other rules which are usually classed as general rules, they either respect the qualification of the witness, which will hereafter be considered, or the order of proof with reference to the form of pleading; and therefore do not properly fall within the purpose of this note, which is merely to bring together such general rules as respect the nature of the evidence to be allowed.

(*c*) The position in Practical Register is, that all persons who are good witnesses at law, are so in equity: but this position by no means excludes the testimony of some persons to certain facts in a court of equity, which they would not be competent to prove in a court of law; thus an accounting party may in equity discharge himself by his own oath of small sums under 40*s.* provided they do not in the whole exceed the sum of 100*l.*; see margin (5) (6). Thus also a wife, plaintiff in a suit against her husband, may read the answer of her husband in support of her claim. The first instance is evidently founded on the rule that he who seeks equity shall do equity, and the latter may

ing, &c. (*f*) his testimony is not to be admitted (2). And the objection that the

(2) Co. Lit. 6. *Rex* v. *Davis*, 5 Mod. 74.

be referred to the difference of the judicatures; a court of equity allowing the wife to sue her husband, which a court of law will not: But to allow her to sue her husband, and to exclude her from the benefit of his admission of facts which she might not be able otherwise to establish, were a mere mockery; she is therefore, when allowed to become a suitor against her husband, entitled to all the rights of any other suitor.

(*d*) It appears that formerly the infamy of the punishment was supposed to create the disqualification; but, according to the more correct and liberal construction of modern times, it is the infamy of the crime and not of the punishment which creates it, nam ex delicto non ex supplicio emergit infamia; and therefore persons stigmatized by an infamous punishment, such as being set in the pillory, are admissible witnesses, unless the punishment was inflicted for forgery, perjury, or any species of the crimen falsi, or any other crime of an infamous nature, or so declared by positive law; for, says Lord Chief Baron Gilbert, a man may be pillored for speaking loose and scandalous words of the government, which yet in doubtful and factious times ought not to be taken as a presumption against his common credibility. Law of Evidence, 140, 141; *Rex* v. *Crosby*, 1 Salk. 689; *Rex* v. *Ford*, 1 Salk. 690; *Pendock* v. *Mackender*, 2 Wils. 18. See the very elaborate and luminous judgment of Sir William Scott, in the case of the ship Ville de Varsovie, in which the evidence of Lord Cochrane was received, notwithstanding the objection that he had been convicted of a conspiracy. By what means the competency of such a person may be restored, see

party is concerned in interest, though never so small (*g*), have usually prevailed (3), (3) *Dodswell* v. *Nott*, 3 Vern. 317.

Buller's Ni. Pri. 292, 8th ed.; see also Mr. Capel Loft's ed. of Gilb. Law of Evid. p. 257.

(*e*) This incapacity is either propter ætatem aut propter defectum rationis. The first species of incapacity applies to children, who, from the tenderness of their years are defective in their understanding, or insensible of the religious obligation of an oath. The latter species of incapacity applies to idiots and lunatics. As to idiots, whose unfortunate situation implies the total want of understanding à nativitate, their testimony is necessarily excluded in all cases. But with regard to lunatics, whose diseased state of mind allows of intervals of intelligence, it should seem too much to exclude their testimony during such intervals, respecting facts which had occurred also during a lucid interval. See B. 1. c. 2. l. 3. note (*x*).

(*f*) Or if he be an infidel, that is, if he possess no religion, for if he do profess a religion, however absurd such religion may appear to us, yet as he attributes to it a sacred influence and authority, it will bind his conscience to speak the truth, and therefore he shall be admitted as a witness, and sworn according to the ceremonies prescribed by such religion. There certainly are dicta in our books, whence it might be inferred, that by the ancient common law, all persons not professing Christianity are disqualified from being witnesses; but the numberless inconveniencies, not to say the gross injustice, which must have resulted from a rigid adherence to such a rule, necessarily compelled the adoption of the more liberal and enlarged policy which now prevails.

unless in special instances (*h*). As, 1st, for the necessity, where no other evidence

But though infidels are, under certain circumstances, now allowed to be competent witnesses, persons excommunicated are said to be disqualified; because, being excluded out of the church, they are supposed not to be under the influence of any religion. It were difficult to trace the origin of this disqualification; it appears to have prevailed in very early times, and even then referred to as an established rule; but whatever might be the motives from which this disqualification derived its origin, its prevalence at the present period, when one considers the several causes of excommunication recited by the statute 5 Eliz. ch. 23, cannot but create surprise. Mr. Capel Loft, (Law of Evidence, 261,) enumerating such causes, observes, "the first is heresy; which, whatever it may mean, implies a sense of religious obligation and of conscientious acceptance of Christianity itself, as divinely revealed. How then does it presume a man to have no regard to the uttering an injurious falsehood in the presence of the Deity, and, in repugnance to that religion, the truth and authority of whose general doctrines he admits? Another cause is, error in opinion in matters of religion and doctrine received and allowed in the church of England. Now, if the church of England were really infallible, it would be a misfortune to differ from her in any point, but certainly no ground of civil incapacity, especially to preclude a court of justice from being informed by a person labouring under that misfortune. Another cause is simony, which as a corrupt trafficking, may indeed affect the credit of a witness, though the offence is constituted so strangely, that ecclesiastical right and wrong upon this subject enter commonly in a manner very perplexing to a lay imagination, should it attempt

could possibly be had, as where a man tears a note, or a goldsmith's apprentice overpays a bill of exchange. 2dly, In

to define the principles of morality or sense by which the boundaries have been settled: a remark not very dissimilar may be applied to usury. Incontinence, under which censure antinuptial commerce was till very lately included (27 G. 3. c. 44,) though the parties should have made the amende honorable by intermarrying, is another of the recited grounds of excommunication, as if being unguardedly awake to the impressions of nature, demonstrated an insensibility to the voice of truth."

The stat. 3 Ja. I. c. 5. having enacted, that every popish recusant should stand to all intents and purposes disabled, as a person lawfully excommunicated, it is said that they were also disqualified from being witnesses, *Attorney General* v. *Griffith*, 2 Buls. 155; a construction which a truly learned writer (Serjt. Hawkins) affirms to be "too severe, for this, like all other penal statutes, ought to be construed strictly, and the words thereof are no more than that such persons shall stand disabled, &c. as persons lawfully excommunicated, &c. and, as the purport thereof may be fully satisfied by the disability to bring any action, it seems to be too rigorous to carry them any farther." Pleas of the Crown, B. 1. c. 12.

Another disqualification arises out of the relation in which persons may stand to the parties in the cause. This disqualification, by the civil law, involved various descriptions of persons, Cod. lib. 4. tit. 20, the reason of which is fully considered by Perezius Prælec.

odium spoliatoris, the oath of a party injured shall be a good charge on him who

in Cod. lib. 4. tit. 20; but which the law of England, reluctantly excluding the testimony of any persons to whose testimony credit might be safely given, confines to husband and wife, and counsel, and attornies.

The exclusion of the testimony of husband and wife, for or against each other, by the civil law, proceeded on the presumption that their testimony could not be unbiassed; but this consideration, though it may have influenced our adoption of the rule, is not the only one, the disqualification being principally (as remarks the learned commentator on our laws) "in respect of the union of person, and therefore if they were to be admitted to be witnesses for each other they would contradict one maxim of law, nemo in propriâ causâ testis esse debet; and if against each other, they would contradict another maxim, nemo tenetur seipsum accusare." 1 Bla. Com. 443. "However, there are some exceptions to this rule: First, in the case of high treason, it has been said that a wife shall be admitted as a witness against her husband, because the tie of allegiance is more obligatory than any other: Secondly, by the 5th Geo. II. the wife of a bankrupt may be examined by the commissioners touching his estate, but not his bankruptcy: Thirdly, if a woman be taken away by force and married, she may be an evidence against her husband, indicted on the 3d Henry VII. 2. against the stealing of women; for a contract obtained by force has no obligation in law. So upon an indictment, on 1 Jac. I. c. 2, for marrying a second wife, the first being alive, though the first cannot be a witness, yet the second may, the second marriage being void; and whether a

did the wrong (4). 3dly, After a great length of time; as in an account of

(4) *East India Company* v. *Evans*, 1 Vern. 308.

wife de jure may not be a witness against her husband on an indictment for a personal tort done to herself, seems to be matter of doubt. In *Lord Audley*'s case, she was allowed to be a witness to prove her husband assisted in a rape upon her; and though this case has been denied to be law, yet it was in cases where the indictment was not for a personal tort to the wife; and in the case of *Azyre*, on an indictment for the battery of the wife, Lord Raymond suffered the wife to give evidence; and the wife is always permitted to swear the peace against her husband, and her affidavit has been admitted to be read on an application to the court of King's Bench, for an information against her husband for an attempt to take her away by force after articles of separation; and it would be strange to permit her to be a witness to ground a prosecution upon, and not afterwards to be a witness at the trial: Fourthly, in an action between other parties, the wife may be a witness to charge her husband, *ex gr.* to prove the goods for which the action is brought, sold on the credit of the husband; so, perhaps, in some cases, in an action against her husband, though she will not be admitted to be a witness, yet a confession of her's may be given in evidence to charge him; as where an action was brought for nursing his child, the plaintiff was allowed to give in evidence that the wife declared the agreement to have been for so much per week, because such matters are usually transacted by the women. It may be material to observe, that though this general disqualification equally applies to proceedings in equity against husband and wife; *Anon.* 2 Ch. Ca. 39. *Cole* v. *Grey*, 2 Vern.

twenty years standing, he may prove by oath what he cannot prove otherwise. (5)

(5) *Holstcom* v. *Rivers*, 1 Ch. Ca. 127. *Peyton* v. *Green*, 1 Ch. Rep. 78.

79. *Wrottesly* v. *Bendish*, 3 P. Wms. 238; *Barron* v. *Grillard*, 3 Ves. & B. 166; yet that it does not apply to suits which they may institute against each other. With respect to the exclusion of the testimony of counsel, &c. against their clients, this disqualification of the counsel, &c. is the privilege of the client, it being against the policy of justice to permit any person to betray a secret with which the law has entrusted him; *Lindsay* v. *Talbot*; T. 12 G. I. Bull. Ni. Pri. 284; see also *Sandford* v. *Kemington*, 2 Ves. jun. 189; *Earl Cholmondeley* v. *Lord Clinton*, 19 Ves. 261. But to this rule there are some exceptions; first, as to what such persons knew before the retainer, for as to such matters, they are clearly in the same situation as any other person; secondly, to a fact of his own knowledge, and of which he might have had knowledge without being attorney or counsel in the cause; Buller's Ni. Pri. 284. For further qualifications of the above general rule, see Espinasse's Ni. Pri. 718.

Informers, though interested by the promised reward, are competent witnesses; see Trials under the special commission of the rioters in 1780, where it was so adjudged.

(*g*) No rule can be more reasonable, in a general view, than that which requires the testimony by which any fact is to be established, to be free from that bias which an interest in the event might even imperceptibly give to the mind of the witness; but this rule, though so

4thly, Of small sums in an account, as under 40*s.* he shall be discharged by his

admirable in its principle, is perhaps, of all the rules of evidence, the most flexible in its application. The variety of influences to which the human mind is subject, may be considered as interests which it more or less anxiously consults. The voice of nature may be supposed to give a bias to the testimony of those who stand in the relation of blood; and, according to even the worldly construction of interest, the child is interested in preserving the character and defending the property of its parent; but it is a species of interest, which the law does not apprehend to be likely to supersede the rights of truth and justice, and therefore a child, by our law, may be a witness for or against his father. The habits of friendship may have so blended the claims of character, that the testimony of a friend may in some instances be considered as the testimony of a man on his own behalf, but the law does not reject such testimony; it may indeed, in such instances, be influenced by a more powerful motive than the prospect of acquiring or preserving wealth, but it is a consideration which does not disqualify the witness, however it may weigh in estimating his credit. What then, it may be asked, is intended by the interest which excludes the testimony of a man whose testimony is in other respects unimpeachable? It is a melancholy reflection, that though the law of England conceives the claims of truth to be sufficiently strong to repress the feelings of nature, and the not less powerful dictates of friendship, it dare not trust the interests of justice to that species of influence which the smallest present actual or supposed pecuniary benefit may excite. I mean not to arraign the wisdom or policy of the rule. I have

oath, but he shall not charge another so. And this rule extends no further than for

already stated it to be of all the rules of evidence the most flexible in its application: that liberal spirit, which ever accompanies the truly enlightened mind, having modified its rigour by distinguishing that actual interest which goes to the competency of testimony, from that influence which merely affects the credit of it. See *Abraham* v. *Bunn*, 4 Burr. 2251.

With respect to what interest will disqualify, it seems that not only an actual but a supposed or expected interest will be sufficient; *Fotheringham* v. *Greenwood*, 1 Str. 129; not only an immediate, but an ultimate benefit, as if the party and witness claim under the same title or in the same right. To pursue the point would exceed the province of a note; I must beg therefore to refer to the several treatises upon the law of evidence, and particularly to the very valuable treatise of Mr. Phillips, and to the collection of decisions upon that subject, which are to be found in our writers upon the law of Nisi Prius and Crown Law.

(*h*) The exceptions which our author has stated are those which most frequently occur in courts of equity, but they are by no means all the exceptions which have been allowed. For first, A party interested will be admitted as a witness in a criminal prosecution, in most instances for the sake of public justice. 2dly, A party interested will be admitted for the sake of trade. 3dly, A party interested will be admitted where no other evidence is reasonably to be expected. 4thly, A party interested will be admitted where he acquires the interest by his own act, after the party who calls him as

the sum of 100*l.* and he must mention to whom paid, for what, and when; for in an account he must prove the particulars (6). 5thly, Where he has released his interest, though the release was sealed in court while the cause was trying (7). 6thly, Particeps criminis is admitted to prove matters of fraud, especially where what he proves is to his own prejudice (8). 7thly, If one be made a defendant by covin to take away his testimony (*i*), and it appears upon the evidence, the judges may and ought to allow him to be a witness (9). And this cannot be a general rule; but every case stands on its own circumstances, that is, whether the interest is so great as may be presumed to make them partial, or not; and therefore alms

(6) *Anon.* 1 Vern. 233. *Marshfield* v. *Weston*, 2 Vern. 176. *Everard* v. *Warren*, 2 Ch. Ca. 249.

(7) *Stephens* v. *Gerrard*, 1 Sid. 315. *Callow* v. *Mince*, Pre. Ch. 234. *Goodtitle* v. *Welford*, Dougl. Rep. 134.

(8) *Buller's* Ni. Pri. 286. *Bridgman* v. *Green*, 2 Ves. 629.

(9) *Saville*, 34, pl. 81. 1 Mod. 11. 1 Sid. 441.

a witness has a right to his evidence. 5thly, A party interested will be admitted where the possibility of interest is very remote. See Buller's Ni. Pri. 288, 289, 290, where the above exceptions are stated and illustrated by cases. That a subscribing witness to a will under which he took no direct interest, but in the validity of which he afterwards became interested by marriage with one of the devisees, is competent, see *Brograve* v. *Winder*, 2 Ves. jun. 634.

(*i*) If a man unnecessarily makes any one a defendant, he thereby deprives himself of the benefit of such

people and servants are good witnesses. So it is usual for a legatee of a small legacy (*k*) as 5*s.* to a private person, or 5*l.* to a nobleman, to be admitted a witness for the will (10).

(10) *Corporation of Sutton Coldfield* v. *Wilson*, 1 Vern. 254.

party's evidence, for it is his own fault; but a co-defendant shall not be deprived of his evidence, for by such contrivance he might take off all the defendant's witnesses; *Gibson* v. *Albert*, 10 Mod. 19. *Piddock* v. *Brown*, 3 P. Wms. 288. See also *Barrett* v. *Gore*, 3 Atk. 401. *Nightingale* v. *Dodd*, Ambl. 583.

(*k*) See Stat. 25 Geo. II. c. 6.

SECTION II.

As to the evidence, the usual course in Chancery is by depositions, for no witnesses vivâ voce are allowed at the hearing, except by special order (1). And there being the same question in both causes, and defendant's defence being the same, the depositions in a former cause

(1) *Harrison's* Chancery, 598, 599.

shall be read against him (2) But depositions in another cause, in which the matters in question were not in issue, shall not be read (3). So depositions taken in a suit betwixt other persons are not to be given in evidence (*l*); for he had no opportunity to cross-examine them (4). So depositions taken in a cause; where the plaintiff's father was a party to the suit, being in all matters the same, his father being only tenant for life, those depositions could not be read against him; for the advantage ought in all cases to be reciprocal (5). And where a cause is dismissed, the matter of it not being proper for equity to decree, yet the fact in this

(2) *Nevil* v. *Johnson*, 2 Vern. 447, 1 Ch. Ca. 73. 1 Freem. 184.

(3) *Christian* v. *Wren*, Bunb. 321.

(4) *Earl of Bath* v. *Battersea*, 5 Mod. 9.

(5) *Coke* v. *Fountain*, 1 Vern. 413. *Earl of Peterborough* v. *Duch. of Norfolk*, Pre. Ch. 212.

(*l*) This rule does not apply to depositions taken in a suit to establish a custom or modus, or any other claim founded on prescription. See Hardres 472, as to reversioner's taking benefit of a verdict for the lessee. That depositions taken in a suit to perpetuate testimony, cannot be read in support of a claim to a peerage by the plaintiff in such suit, the Attorney General not being a party to it, see proceedings on the claim of Colonel Berkeley to the Berkeley peerage, 1811; but *query*, as the Attorney General could not properly be made a party to such suit. And as to the course of proceedings in the examination of witnesses, see Gilbert's Forum Romanum, 122. Harrison's Chancery, 1 V. p. 462, 481. Hinde's Practice in Chancery, 422, and the Practical Register, 15 Ves. 380.

cause proved may be used as evidence between the same parties, whenever it shall come in question again. But when a cause is dismissed, not upon this ground, but for irregularity, so that in truth there was never regularly any such cause in the court, and consequently no proofs, those proofs cannot be used; for proofs cannot be exemplified without bill and answer, nor can they be read at law, unless the bill upon which they were taken can be read (6). Lastly, no depositions ought to be allowed, which were taken in a court of record; and they are like examination of witnesses; So that although the defendant may read what part he will, yet the other side may read the whole afterwards (7).

(6) *Backhouse* v. *Middleton*, 1 Ch. Ca. 175.

(7) *Earl of Bath* v. *Battersea*, 5 Mod. 10. 15 Ves. 176.

SECTION III.

And although all exhibits proved by the depositions may be read at the hearing, yet they must be shewn forth in court, if the party will have any benefit of them (1); and parties and privies ought to

(1) Harrison's Ch. 574.

shew the original deed (*m*) for every deed ought to prove itself (*n*), or be proved by others; but strangers to the deed, and who do nothing in right of the grantee as bailiff or servant, may plead the patent or deed, without shewing it. So a will, which is the plaintiff's title, must be shewn to the court itself, and not a copy (*o*) only (2); otherwise, where it is by way of circumstance (3). But where

(2) *Rothwell* v. *Hussey*, 2 Ch. Ca. 202. *Puleston* v. *Warburton*, Comb. 395. (3) *Eden* v. *Chalkile*, 1 Keb. 117.

(*m*) Deeds and copies of records not proved by depositions, may, by special order, be proved vivâ voce at the hearing, so far as respects the execution of them; but no examination is allowed to points that would admit of a cross-examination; *Earl of Pomfret* v. *Lord Windsor*, 2 Ves. 480; and therefore a will cannot be proved at the hearing vivâ voce; *Harris* v. *Ingledew*, 3 P. Wms. 93. Quære, If records themselves may not be read at the hearing, without an order? *Sawbridge* v. *Benton*, Ex. M. 1793, MSS.

(*n*) If the deed be thirty years old, it may be given in evidence without any proof of the execution of it; but some account should be given of it, as where found &c. and if any suspicion arise from any blemishes, rasure or interlineation, it ought to be proved, or the suspicion in some manner done away. See Buller's Ni. Pri. 255. Phillips's Tre. of Evi. 405.

(*o*) This position is confined to wills of land; for of wills of personal estate, the probate, if duly obtained, is conclusive evidence. *King* v. *Raines*, Skin. 583. *Chichester* v. *Philips*, Raym. 404. *Noel* v. *Wells*, 1 Sid. 359.

a deed or other evidence is suppressed, the court will always intend a title against him that suppressed it (4). But a copy of a deed, supposed to be suppressed, is not allowed, unless examined (*p*), nor even upon affidavit that the plaintiff had got it, but he shall be left to recover it at law (5). So although a recital of a lease in a deed of release is good evidence of such lease against the releasor, and those that claim under him; yet, as to others, it is not, without proving there was such a deed, and that it was lost or destroyed (6). And, in case of an inrolment for safe custody, the deed may be said to be recorded. yet a copy of it (7) is no evidence; nor is the inrolment itself without particular circumstances to support it, as proving that the original deed was in the defendant's custody or power, or accidentally lost, &c. (*q*). But, where a bargain and sale is inrolled pursuant to the statute, the in-

(4) *Lewis* v. *Lewis*, Rep. Temp. Finch. 471. *Eyton* v. *Eyton*, 2 Vern. 380. See Phillips's Tre. Evi. 389.

(4) *Lord Peterborough* v. *Lord Mordaunt*, 1 Mod. 94, 266.

(6) *Ford* v. *Grey*, 1 Salk. 285, 286. 6 Mod. 44.

(7) *Lady Holcroft* v. *Smith*, 2 Freem. 259.

(*p*) Upon the same principle the court will not allow the copy of a note of hand to be read, without being previously satisfied that the note was genuine; *Goodier* v. *Lake*, 1 Atk. 446.

(*q*) In the case referred to, the position is thus qualified: "Otherwise than against the party who sealed it, and all claiming under him, and so far it shall." See *Doxon* v. *Haigh*, 1 Esp. Ni. Pri. Ca. 410.

rolment is a record; so that a copy of it may be read in evidence (*r*) (8); for no rasure or interlining shall be intended in a record for the height and solemnity of it; but the sure way is to exemplify it under the great seal, or at least under the seal of the court (*s*) (9.)

(8) *Combe* v. *Spencer*, 2 Vern. 471. *Smartle* v. *Williams*, 1 Salk. 281. 3 Lev. 387. 6 Mod. 225. *Green* v. *Proud*, 1 Mod. 117. *Olive* v. *Gwin*, Hard. 118. 2 Sid. 145.

(9) Dr. Leyfield's case, 10 Rep. 92, 93.

(*r*) This appears to have been the opinion of the Master of the Rolls; but, an issue having been directed a copy of the inrolment was allowed in evidence by the Lord Chief Justice. See 2 Vern. 591. Buller's Ni. Pri. 259, 260, where the case of *Smartle* v. *Williams*, is observed upon.

(*s*) In *Potts* v. *Durant*, 3 Anstr. Rep. 789; an ancient writing purporting to be an inspeximus under the seal of the Bishop, was held to be inadmissible evidence; because it came out of private hands; but, query this determination, as there is no public repository for exemplifications, and, indeed, the very purpose of them in general requires them to be in private custody. See *Michell* v. *Rabbetts*, cited in 3 Taunton, 91. *Bullen* v. *Michel*, 2 Price, 399; 4 Dow. 298. But where there is a public repository for the particular instrument offered in evidence, its authenticity, in a great degree depends upon its being found in the proper place, and, therefore, it has been held, that a terrier cannot be received unless it came from the registry of the bishop, *Atkyns* v. *Hatton*, 2 Anstr. 386; but it appears from a note to that case, that in *Miller* v. *Foster*, upon a motion for a new trial, the court of King's Bench thought that such evidence ought to have been received. See also *Potts* v. *Durant*, 3 Anstr. Rep. 795.

CHAP. II.

Of Averments and Parol Evidence.

SECTION I.

RECORDS, when perfect, for avoiding infiniteness, which the law abhors, estop all parties, and privies from contradicting any thing apparent in the record (1); and a record cannot be confessed and avoided, as to say, that he was not a person able (*a*), &c. for then every record might be so avoided by a nude averment. But to take an averment which stands with the record, and which does not contradict any thing apparent in the record to the judges by construction of law upon the words, the law well admits and allows of (2). So a deed indented is the deed of both parties (3), though they were the words of

(1) 1 Rolle's Abr. 862.

(2) 1 Rolle's Abr. 862. Com. Dig. Estoppel, (E. 3.) Co. Litt. 352. (3) Co. Litt. 363, b. Sheppard's Touchstone, 52.

(*a*) And therefore infancy cannot be averred at law in avoidance of a recovery or fine. *Hungate*'s case, 12 Rep. 122. 2 Inst. 483. But see b. 1. c. 2. § 5. note (*d.*)

but one; for both seal it, and of consequence are estopped by it (*b*), viz. in all the material and essential parts, without which it would not be good (*c*). Otherwise of a patent, or deed poll (4); because the estoppel there is not mutual, as it ought to be. But to a deed they may plead non est factum, et pari ratione may confess and avoid it, as by coverture or the like. And although a deed is, primâ facie, an estoppel, yet they may plead or aver any matter of fact, which stands with the words of the deed (5). But no averment can be taken against the judgment of law, which appears to the judges upon view of the deed (6); for matter of fact is to be tried by the jury (*d*), but matter of law by the judges only.

(4) Co. Litt. 363 b.

(5) Rolle's Ab. 872, 10 Vin. Ab. 470.

(6) *Weale* v. *Lower*, Pollex. 67.

(*b*) Not if the deed be void at law, in respect of its consideration, as if it be usurious. 5 Rep. 69 b.

(*c*) What are the essentials of a deed, see Touchstone, 54.

(*d*) That an ambiguity in a deed may be explained by usage, see *Withnell* v. *Gartham*, 6 Term Rep. 397.

SECTION II.

BUT, in case of estoppels, verdict against the truth, or the law being founded upon an untrue presumption, Chancery will relieve. And although such assurances, as are used for the common repose of men's estates, equity will not draw in question; (for a fine with proclamations ought, after five years, to be a bar in conscience, as it is in law; so shall it be of a common recovery for docking the entail;) yet if a fine is unfairly obtained (*d*), equity will order a reconvey-

(*d*) Whether a fine may not at law be avoided by fraud, &c. Cruise on Fines, 311.

Courts of equity will interpose against the operation of a fine, not only on the ground of fraud, but also on the ground of lunacy; see *Rushtoy* v. *Mansfield,* Toth. 42; *Addison* v. *Dawson,* 2 Vern. 678; so also of infancy in the cestui que trust: *Allen* v. *Sayer,* 2 Vern. 368; so also if the person levying the fine had notice of an existing charge upon the land; *Draper's Company* v. *Yardly,* 2 Vern. 662; so if the fine be levied by trustee; see case stated in *Bovey* v. *Smith,* 1 Vern. 149; *Shields* v. *Atkins,* 3 Atk. 563; *Pomfret* v. *Lord Windsor,* 2 Ves. 482; 2 Atk. 631; or by mortgagor in posses-

ance (1), and the court where it is acknowledged will vacate it for error, or irregularity (2). Neither is a judgment at law to be pleaded in bar to a suit in equity, notwithstanding the statute of 4 H. IV. cap. 22; because that statute meant only to restrain such jurisdiction as did take upon it to reverse the judgment, as error and attaint doth, which the Chancery never pretended to, but leaves the judgment in peace, and only meddles with the corrupt conscience of the party. And although it is said, that the common law used some power to restrain such examinations directly before any statute made; yet these seem rather to examine the manner, than the very matter and substance of the thing adjudged (*e*).

(1) *Welby* v. *Welby*, Toth. 99, 100. *Wright* v. *Booth*, Toth. 101. *Barnesly* v. *Powell*, 1 Ves. 289. *Wilkinson* v. *Brayfield*, 2 Vern. 307. *Clarke* v. *Ward*, Pre. Ch. 150.

(2) Sir John Turner, 1 Eq. Ca. Ab. 259.

sion; *Focus* v. *Salisbury*. Hard. 400, 402; or mortgagee in possession; *Weldon* v. *Dux Ebor*, 1 Vern. 132: but see *Lingard* v. *Griffin*, 2 Vern. 189. Nor shall a fine levied, in pursuance of a decree, be allowed to operate beyond the particular purpose for which it was directed to be levied; *Goadrick* v. *Browne*, 1 Ch. Ca. 49. 2 Vern. 56.

(*e*) See the jurisdiction of the Court of Chancery vindicated, 1 Ch. Rep. where the point is very elaborately discussed.

SECTION III.

So, in natural justice, deeds and writings are considered only as memorials of the contract, not as a substantial part of them (1); and therefore any other proof is as well (*f*), and the estoppel will not in equity be regarded against the truth: As if a covenant be general, that he was lawfully seized, and there is proof that it was declared upon sealing, that he should undertake for his own act only, he shall be relieved (2). So if, in the purchase of a manor, a copyhold, being a little before escheated, was not intended to pass in demesne, and was left out of the particular; yet if the conveyance was sufficient to pass it at law, the vendor shall be relieved in equity (3). So where a lease for years was made in trustees, precedent to the wife's settlement, only to

(1) Grotius de Jure Belli et Pacis, lib. 2. c. 16. § 30.

(2) *Dr. Coldcott* v. *Hill*, 1 Ch. Ca. 15.

(3) *Sir Wm. Beversham's* case, 2 Vent. 345.

(*f*) This position is too general, nor do the cases referred to support it: I have, however, already had occasion to consider in what cases evidence may be given of matter not comprehended in a deed or other written instrument; see b. 1. c. 3. § 11 note (*o*).

protect the wife's estate against the violence of the times, and not to exclude the husband, but the sequestrators; upon proof of this, by one single witness of an undoubted reputation (*g*), the nature of the case requiring secrecy, Chancery will relieve against the trust expressed in the deed (4). And in case of a surrender made by a steward of a copyhold, if there be any mistake there, that is only matter of fact, and the courts at law will in that case admit an averment, that there was a mistake, &c. either as to the lands or uses (5).

(4) *Harvey* v. *Harvey*, 2 Ch. Ca. 180.

(5) *Towers* v. *Moor*, 2 Vern. 98. *Hill* v. *Wiggett*, 2 Vern. 547.

(*g*) The general rule is, "that where the defendant in express terms negatives the allegations of the bill, and the evidence is only one person affirming what has been so negatived, that the court will neither make a decree nor send it to law." *Pember* v. *Mathers*, 1 Bro. Ch. Rep. 52; *Mortimer* v. *Orchard*, 2 Ves. jun. 243; unless there be circumstances corroboratory of the testimony of the witness, see *Walton* v. *Hobbs*, 2 Atk. 19. and the cases referred to by Mr. Sanders in his note.

SECTION IV.

As for a testament proved sub sigillo episcopi, it is no estoppel: yet the last will of a man is looked upon as the last serious act of his life, as to the disposition of his estate, and must be admitted sufficient to repeal all former wills, and much more to control all parol declarations. It is to be considered, therefore, as it stands upon the will alone (*g*), and would have been so, even before the making of the statute of frauds and perjuries; for, by the statute of wills, by which men are enabled to make wills, and devise their lands, it must be a will in writing, and should parol proof be admitted, it would introduce a mighty incertainty, and an infinite inconvenience.

(*g*) That parol evidence is, under some circumstances, admissible to convert a legatee into a trustee, see b. 2. c. 2. §. 4. marg. (3). See *Moore* v. *Moore*, 1 Phill. 422, 430.

SECTION V.

BUT this rule has received a distinction, which has greatly prevailed, viz. Between evidence offered to a court, and evidence offered to a jury; for, in the last case, no parol evidence is to be admitted, lest the jury might be inveigled by it; but, in the first, it can do no hurt, being to inform the conscience of the court, who cannot be biassed (*h*) or prejudiced by it (1). And, therefore, though such an averment could not be admitted, where it was to make the party a title; yet, where it was only to rebut an equity, it might (*i*). As where *A.* charged his real estate with payment of his legacies and debts, and devised his estate so charged to the defendant

(1) 1 Eq. Ca. Ab. 230, note (a).

(*h*) This distinction assumes more than general experience can warrant, and though it has occasionally been acted upon, the interests of justice would probably be more effectually secured, by excluding an impression which may be improper, than by trusting to the judge's power to control its influence. see *Sandford* v. *Remington*, 2 Ves. jun. 189.

(*i*) See cases referred to, b. 2. c. 5. § 3. marg. (6), and note (*l*), p. 131.

his nephew, and made the plaintiff his wife executrix: Proofs may be admitted, that it was *A.*'s intention, that she should have the personal estate clear of the debts; and if it were taken from her by the creditors, she should come in as a creditor on the real estate (2). So where a money legacy, given to an executor, shall exclude him from the surplus, the presumption being, that the testator did not intend him all and some; yet such presumption may be ousted or taken away by a proof of the testator's intention, that his executor should have the surplus, or that his next of kin should not have it (3), especially if a specific legacy were given to the next of kin; for one may aver the trust of a personal estate. So the construction of making a gift a satisfaction, has, in many cases, been carried too far: It is, therefore, reasonable, in such cases, to admit of parol proof as to the testator's intention (4). However, the later resolutions have been very cautious of admitting parol evidences, because they encourage suits and litigations, and introduce the very mischiefs that the statute intended to prevent (5).

(2) *Gainsborough* v. *Gainsborough*, 2 Vern. 252.

(3) *Bachelor* v. *Searle*, 2 Vern. 786. See B. 2, c. 5, § 3. note (*b*).

(4) *Cuthbert* v. *Peacock*, 2 Vern. 594. See B. 4, p. 1, c. 1. § 5. note (*l*).

(5) See p. 135.

SECTION VI.

BUT although no proof ought to be received to supply the words of a will, since the will that must pass the land must be in writing, and must be determined only by what is contained in the written will (1); yet there can be no hurt in admitting collateral proof (2), to make certain the person or the thing described (3). As where *A.* devised to *B.* lands of 60 *l.* per annum, paying 100 *l.* which he by bond owed to *J. N.*; it happened that the 100 *l.* bond was not due to *J. N.*, but to *S. H.*; but the person who drew the will having swore, that the testator intended the debt to *S. H.*, the devisee of the lands shall be liable. So to ascertain the thing, notwithstanding the statute of frauds (4); for it neither adds to nor alters the will, but only explains which of the meanings shall be taken. Yet some have doubted, whether they could read witnesses on a will of lands by the statute, though it were only in preservation of the devise. But,

(1) *Lord Cheney's* case, 5 Rep. 68.
(2) 15 Ves. 514.
(3) *Hodgson* v. *Caldicott*, 2 Vern. 593. *Utrich* v. *Litchfield*, 2 Atk. 373. *Fonnereau* v. *Poyntz*, 1 Bro. Ch. Rep. 475. See 1 vol. B. 1. c. 6. s. 11. *Masters* v. *Masters*, 1 P. Wms. 421.
(4) *Pendleton* v. *Grant*, 2 Vern. 517.

to be sure, if the devise would admit of any sense, they could not be read (*i*).

(*i*) "Mistakes (observes Lord Hardwicke) are never to be supposed, if any construction that is agreeable to reason can be found out." *Purse* v. *Snaplin*, 1 Atk. 516. See Phillips's Tre. of Evi. ch. 10. s. 1; *ante*, B. 1. c. 2. s. 7.

SECTION VII.

And it is a settled rule in the court of Chancery, that although they will read parol proof to fortify any natural construction that arises from the words of the will; yet they will never read any parol proof to make any alteration in the will, or addition to it (*k*). And if the bequest cannot be made out but by the parol deposition of the witnesses, there being only initial letters for the names of the legatees (*l*), as it is not substantive in

(*k*) Unless fraud or mistake be imputed.

(*l*) As where a blank is added to a general legacy, no person is considered as referred to, see *Hunt* v. *Hart*,

writing, it is not a written but nuncupative will, and, therefore, without the circumstances required by the statute, is void (1).

(1) *Davis* v. *Glocester*, 1 Eq. Ca. Abr. 408, 404; but see *Abbot* v. *Massie*, 5 Ves. 148.

3 Bro. Ch. Rep. 311, and *Attorney General* v. *Baylis*, 2 Atk. 239. But, quære, Whether parol evidence is not admissible to ascertain the person intended, if the name of the legatee be blindly written, or falsely spelt? See *Masters* v. *Masters*, 1 P. Wms. 425.

CHAP. III.

Of a Discovery.

SECTION I.

In the law of nature, when deeds and undeniable instruments cannot be produced (*a*), they must then give judgment

(*a*) There is no branch of equitable jurisdiction of more extensive application than that which enforces discovery, and where kept within its due limits there is none more conducive to the claims of justice. To compel a defendant to discover that which may enable the plaintiff to substantiate a just or to repel an unjust demand, is merely assisting a right or preventing a wrong. But as the most valuable institutions are not exempt from abuse; this power, which ought to be the instrument of justice, may be rendered the instrument of oppression. A plaintiff, by his bill, may, without the least foundation, impute to the defendant the foulest frauds, or seek a discovery of transactions in which he has no real concern; and when the defendant has put in his answer, denying the frauds, or disclosing transactions, (the disclosure of which may materially prejudice his interest,) the plaintiff dismisses his bill with costs, satisfied with the mischief he may have

according to the testimony of witnesses, or, with consent of the other party, give him his oath. I say with the consent of the other party, for else, in the liberty of nature, no man is obliged to put the issue of his cause upon another man's conscience. Though in the civil law, the judge ex officio, if he saw occasion, might put the defendant to his oath, or the party interested might demand it. And this was decisive between the parties and their representatives, but did not hurt a third person (1). So in Chancery, though witnesses are examined, yet you may afterwards examine the defendant (*b*). And

(1) 1 Domat's Civil Law, B. 3, Tit. 6. § 6.

occasioned by the publicity of his charge, or with the advantage which he may have obtained by an extorted disclosure. The rule, which requires the signature of counsel to every bill, affords every security against such an abuse, which forensic experience and integrity can supply, but it cannot wholly prevent it. The court alone can counteract it; and in vindication of its process must feel the strongest inclination to interpose its authority.

(*b*) Directions for such purpose are usual in decrees; but it is by no means true that after publication, or even after examination of witnesses, a party may, as of course in equity, enforce from defendant a discovery of matter material to his case, except by a cross bill.

a bill lies there for the discovery of an estate by one who had a title to it; as by the patentee of the goods of a felon, or of one outlawed, for outlawry is in nature of a gift or judgment to the king (2). So where A. obtained judgment against B. and the defendant, to defraud him of the benefit of it, assigned his estate to trustees for himself. A. may have a discovery, though it is objected, that this is in the nature of a foreign attachment, and that there could not be a discovery of a man's personal estate in his life-time (3). But if the plaintiff in such case has not taken out execution (c), it will not be allowed (4). And it seems agreed, it would not lie against the debtor himself, nor to have a general discovery from a third person (5), but only for particular things. So where a fire happens in a man's house, and burns his neighbour's likewise, although he is liable to damages at law, yet the plaintiff in such

(2) *The Protector* v. *Lord Lumley*, Hard. 22.

(3) *Swithier* v. *Lewis*, 1 Vern. 399.

(4) *Angel* v. *Draper*, 1 Vern. 399. *Shirley* v. *Watts*, 3 Atk. 200. *Belch* v. *Wastall*, 1 P. Wms. 444.

(5) *Utterson* v. *Mair*, 2 Ves. jun. 95.

(c) *Quære*, whether this rule extends to trust property? And whether a court of equity can give any relief to a judgment creditor as against the money of the debtor in the public funds, *Dundas* v. *Dutens*, 2 Cox's R. 235. But see *Horn* v. *Horn*, Ambl. 79. *Taylor* v. *Jones*, 2 Atk. 600.

case shall not be assisted in equity; for though the law gives an action, yet it does not arise out of any contract or undertaking of the party (6). But the case is not parallel, where a lighter is overset by negligence of the lighterman, or a ship takes fire by the negligence of the master or ship's crew, these come within the reason of any common carrier, and therefore he shall have a discovery to enable him to bring his action (7). Yet a plaintiff is not admitted to a discovery without verifying his title at law (*d*). So that if there be a full answer given to the thing in demand, till that be tried, the defendants are not bound to discover. As in a bill for tithes, if they plead the statute of 13 Eliz. cap. 20, against non-residence in bar: Or in case of tithes of

(6) *Morse* v. *Buckworth*, 2 Vern. 443.

(7) *Heathcote* bart. v. *Fleete*, 2 Vern. 442.

(*d*) This rule admits of several exceptions; as, if the plaintiff's interest in the subject be purely equitable, or though legal, it be obstructed by the fraud of defendant, or the plaintiff be a dowress praying an assignment of dower, *Curtis* v. *Curtis*, 3 Bro. Ch. Rep. 620; *Mundy* v. *Mundy*, 4 Bro. Ch. Rep. 294, or the bill be for an account of mesne profits accrued during infancy, or for a discovery of assets on behalf of a creditor. *Thomas* v. *Williams*, Bunb. 28; or to remove some impediment, or to obtain some evidence, without which the legal title cannot be made available.

conies by custom, if they deny the custom. And the rather, because the demand was against common right, and if it should be otherwise, the defendant by a feigned suggestion might be forced to discover any thing (*e*). But if in that case, the matter be found against the defendant, he shall after be examined upon interrogatories. But where there is no such great inconvenience, as upon a bill against an executor to discover assets, he must answer, though he denies the debt, because it concerns the act of another (8).

(8) *Randal* v. *Head*, Hard. 188.

(*e*) The case referred to, has been often over-ruled, it being now held, that to a bill for tithes the defendant cannot protect himself from the discovery of the several matters alleged to be titheable, *Gumley* v. *Fontlenoy*, Bunb. 60; but he may by his answer insist on facts in bar of plaintiff's right, and have the same benefit from such insisting, as in other cases from a plea or demurrer.

SECTION II.

As to the difference of the persons (*f*), for whom and against whom a discovery will be admitted, it is to be observed, that persons who claim lands by a will, or any

(*f*) The object of courts of equity in enforcing discovery, being to possess the plaintiff, who appears to have a legal or equitable right, of that evidence which is necessary to enable him to make a legal or equitable right available, it may be easy to ascertain for what persons a discovery will be enforced; but as it might be attended with extreme inconvenience, if, the plaintiff having assumed a character which he did not sustain, the defendant were compelled to afford the discovery sought by the bill, the defendant may, by what is termed a negative plea, protect himself from making the discovery; see Ld. Redesdale's Treatise, 188, 222; *Hall* v. *Noyes*, 3 Bro. Ch. Rep. 489; *Gun* v. *Prior*, 1 Cox's Rep. 197. It may also happen, that though the plaintiff have a claim to the assistance of the court in asserting his legal or equitable right, yet that the defendant has an equal claim to the protection of the court, in defending his possession, in which case the court will not interpose on either side. Ld. Redesdale's Treatise, 215. Such is the case of bonâ fide purchasers, &c. see sec. 3. It may also happen that the situation of the defendant may render it improper for the court to enforce a discovery, as where the discovery might subject the defendant to pains and penalties, or to a forfeiture, or to something in nature of a forfeiture, or where the

other voluntary disposition, having the law on their side, are entitled as against an heir at law (*g*) to a discovery in equity of deeds relating to the estate, and to have them delivered up (*h*); otherwise

discovery would be a breach of professional confidence reposed in defendant as counsel or attorney; see Lord Redesdale's Treatise, 223, 224, to which very valuable work I wish to refer the reader for a clear and comprehensive view of the subject.

(*g*) And an heir at law, though not entitled to come into equity upon an ejectment bill for possession, yet he is entitled to come into equity to remove terms out of the way which would otherwise prevent his recovering possession at law, and has also a right to another relief before he has established his title at law; viz. that the deed and writ may be produced and lodged in proper hands for his inspection; for every heir at law has a right to discover by what means, and under what deed he is disinherited. *Harrison* v. *Southcote,* 1 Atk. 540. *Floyer* v. *Sydenham,* Sel. Ca. Ch. 2. But see *Lady Shaftesbury* v. *Arrowsmith,* 4 Ves. 66; in which case it was held, that the heir at law is not entitled to an inspection of deeds in the possession of the devisees; but that an heir in tail is entitled to an inspection of the deeds creating the estate tail. That a demurrer to a discovery will hold to a bill seeking relief to which the plaintiff is not entitled; see *Price* v. *James,* 2 Bro. Ch. Ca. 319, and the cases referred to in *Hodgkin* v. *Longden,* 8 Ves. 3. and *Todd* v. *Gee,* 17 Ves. 277.

(*h*) As to the security of title-deeds, it seems that though primâ facie title-deeds are properly to be en-

the heir might defend himself at law by setting up prior incumbrances, and by that means prevent the trying the validity of the will (1). So where a will concerning a personal estate is proved in the spiritual court, another having a former will in his favour may bring his bill to discover by what means the latter will was obtained, and to have an account of the personal estate, and whether the testator was not incapable and imposed on, though objected that it belonged to the spiritual court only to prove the validity of the will, and the former will was not proved in the spiritual court, as the will in his

(1) *Duchess of Newcastle* v. *Lord Pelham*, 8 Vin. Ab. 551. pl. 12.

trusted with tenant for life; see *Webb* v. *Lord Lymington*, 1 Eden's R. 8. and cases referred to, note (*a*); yet, says Lord Hardwicke, it is the ordinary relief of the remainder man to have the title-deeds taken care of against the tenant for life. *Southby* v. *Southouse*, 2 Ves. 612; *Ivie* v. *Ivie*, 1 Atk. 430; *Strode* v. *Blackburne*, 3 Ves. 222; but this equity does not extend to a remote remainder man, *Ivie* v. *Ivie*. It is, however, a general rule, that a plaintiff having established an interest in any instrument in the hands of the defendant, is entitled to the production of it. *Smith* v. *D. of Northumberland*, 1 Cox's R. 363; *Earl of Salisbury* v. *Cecil*, 1 Cox's Rep. 277; *Burton* v. *Neville*, 2 Cox's R. 242. As to the general doctrine, see *Ford* v. *Peering*, 1 Ves. jun. 72. As to purchasers of an estate sold in lots, see *Boughton* v. *Jewell*, 15 Ves. 176; *Dare* v. *Tucker*, 6 Ves. 460.

favour was (2). But if a bill is brought by a remote heir for a discovery of a title, and evidence, and to have terms removed, and the title at law cleared, this is one of the hard cases at law, where equity will not assist; for as equity will not relieve the children, should the remote heir recover, so neither will it assist the remote heir.

(2) *Andrews* v. *Powis*, 8 Vin. Ab. 548. pl. 9, 2 Bro. P. C. 476.

SECTION III.

And purchasers shall not discover to impeach or weaken their title (*i*), for by this method all purchases might be

(*i*) It is certainly true, that "as a purchaser for valuable consideration has an equal claim to the protection of a court of equity to defend his possession, as the plaintiff has to the assistance of the court to assert his right," a court of equity will not, in general, compel a purchaser for valuable consideration, without notice of plaintiff's title, to make any discovery which may affect his own title, *Jerrard* v. *Sanders*, 2 Ves. jun. 454; but that such discovery will be enforced in favour of a dowress, see *Williams* v. *Lamb*, 3 Bro. Ch. Rep. 264.

blown up. As whether in a mortgage made by A. to B. which had been assigned to the defendant, there was not some trust declared for the benefit of the plaintiff, though plaintiff charged in his bill that such a lease in defendant's custody mentioned it; for this is but a side wind to make a purchaser expose his title, and the court will not do it (*k*), unless the plaintiff make some proof towards falsifying his answer to induce them to it (1). So an assignee of a lease shall not be forced to discover whether the lease was expired (*l*). So there is no reason to com-

(1) *Hall* v. *Atkinson*, 2 Vern. 463. sed. qu.

As to what shall be considered a valuable consideration, see 2 Bla. Com. 297; and as to notice, see B. 2. c. 6. s. 2, 3, 4; see also Ld. Redesdale's Treatise, 218.

(*k*) It is observable that the reporter has subjoined a query to the case referred to, and indeed it seems difficult to support the decision with reference to the case stated.

(*l*) But lessee for years of the conusor of a statute, has been compelled to discover what estate he had from the conusor, to the end that it might be liable to the statute, *Titchburn* v. *Doddington*, 8 Vin. Ab. 554. pl. 2; and the mortgagee of an estate, partly settled and partly unsettled, must discover the boundaries, if required, by any person claiming under the settlement, *Strode* v. *Blackburne*, 3 Ves. 225.

pel one whose land lies contiguous to mine, to discover the boundaries in his deeds; for that would be to help a man to evidence to evict another of his possession (2). And they will never help the issue against a purchaser (3). But where it is a bounty, as a voluntary devise to the wife for life, in such case the heir having a good title, viz. as heir in tail to his great grandfather, or the like, shall be aided.

(2) *Hungerford* v. *Goring*, 2 Vern. 38,
(3) *Stapleton* v. *Sherbard*, 1 Vern. 212. *Sherborne* v. *Clarke*, 1 Vern. 273. *Kelly* v. *Berry*, 2 Vern. 35. *Bunce* v. *Philips*, 2 Vern. 50.

SECTION IV.

But with respect to the personal estate, there is a difference between contracts that are negotiable (*m*), and such as are

(*m*) Where from any vice in a security negotiable at law, the holder of it cannot recover upon it at law, it is unnecessary for a court of equity to interpose, and therefore in *Ryan* v. *Macmath*, 3 Bro. Ch. Rep. 15, the court dismissed the bill, which prayed that the plaintiff's name might be struck out of a bill of exchange, he not being in partnership with the drawer at the time the bill was drawn; it being incumbent on the

not (1), or where they are not negotiated in a mercantile way (2), where the note passes as ready money. As if it were assigned as a collateral security for a debt already contracted, for there, if the note was fraudulently obtained, or by gaming (*n*), he has no remedy against the drawer. But if he actually negotiates it for value, the indorsee shall in all events have his money of the drawer, though he has paid it before, or it was obtained by fraud; because the indorsee has a legal right to the note, and a legal remedy at law, which the court of equity ought not to take away from him, and it would be to the

(1) Gilb. Lex. Præ. 288, 289.
(2) See B. 1. c. 5. § 1. p. 335. *Brown* v. *Davis*, 3 Term. Rep. 80.

holder of the bill to prove the partnership upon the trial at law: but it may sometimes be necessary for the drawer or acceptor of the bill to come into equity for the purpose of obtaining a discovery of the consideration for, or manner in which such negotiable security was obtained; and in such cases, if the objections are not available at law, equity will relieve against the payee, and all others who can be effected with notice of such objections.

(*n*) That all securities given for money won or lent at play are void, see *Boyer* v. *Bampton*, 2 Str. 1155; *Lowe* v. *Waller*, Doug. 716; and that so are also securities founded on usurious consideration, see *Lowe* v. *Waller*, Doug. 708; and B. 1. c. 4. s. 7. note (*h*).

ruin of all commerce, if the original cause and consideration of such note should be inquired into (3). But the assignee of a chose in action has no remedy at law, or right to sue in his own name, and has only an equitable remedy. And this fails, when the bond or covenant is obtained by fraud (4), or the obligor has a legal discharge, as a release upon payment of the money. So if the bond were assigned for value before payment, there an equitable interest passes, and in such case if the obligor pays the money to the obligee, and cannot plead such payment at law, a court of equity will not interpose to assist him; but if he can, equity will not interpose to assist the assignee (5).

(3) Gilb. Lex. Præ. 288, 289.

(4) *Turton v. Benson*, 2 Vern. 764. *Hill v. Caillovel*, 1 Ves. 123. *Cator v. Burke*, 1 Bro. Ch. Rep. 434.

(5) Gilb. Lex. Præ. 290, 291.

SECTION V.

In the civil law the oath was only to be tendered in civil matters, when the facts and circumstances may render the use of an oath just and decent, and not in criminal matters (1), any more than in the law of England. And it is a standing rule in equity, that no one is bound to betray himself (*o*). For it is the business of courts of equity to relieve against (2), not to assist forfeitures; and by law no one is bound to discover any matters which tend (*p*) to subject himself to penalties or forfeitures (3), as a penal clause in an act of parliament (4), or in a deed, though said it was not a penalty, but part of the contract. But otherwise, if he covenants not to plead or demur to any bill which

(1) Domat's Civ. Law, B. 3. tit. 6. 13.

(2) B. 2. c. 6. § 4.

(3) Ld. Redesdale's Treatise, 257, 224.

(4) *Bird* v. *Hardwicke*, 1 Vern. 109.

(*o*) See Grounds and Rudiments of Law and Equity, 225, where this rule is very fully considered.

(*p*) The rule being that "a man shall not be obliged to discover what may subject him to a penalty, and not what must only," per Lord Hardwicke, 1 Atk. 539. See also *Wallis* v. *D. of Portland*, 3 Ves. 494.

should be brought against him in equity (5), or the plaintiff waves the penalty (*q*). And such pleas ought to have the greatest strictness and exactness as tend to the support of wrong-doing (6). And in some cases, even for a trespass, a bill is proper enough in this court, viz. where by the secret contrivance of it, it cannot easily be proved (7). As if a man in his own ground digs a way under ground to my mineral, and the like. So in case of a bill by the East India Company for a discovery, and to prevent an interloper's trading to the East Indies, there is a great difficulty as to the proof, the matter for the greatest part having been transacted in the East Indies; and therefore the plaintiffs setting forth, that they were willing to wave the forfeiture, shall have a discovery (8). So where the charge is not by way of trespass, but under colour of title, as that defendant by colour of sequestration by the committee, had seized several tithes, &c. due to plaintiff, the plaintiff may pray a discovery

(5) *South Sea Company* v. *Bumpstead*, 1 Eq. Ca. Ab. 77, 78.

(6) *Gascoigne* v. *Sidwell*, Gilb. Rep. 187.

(7) *East India Company* v. *Sandys*, 1 Vern. 127. *Taylor* v. *Crompton*, Bunb. 95. *East India Company* v. *Evans*, 1 Vern. 308.

(8) *East India Company* v. *Sandys*, 1 Vern. 129, 130.

(*q*) See Ld. Redesdale's Treatise, 157, 158, 224; where the general rules and their exceptions upon this subject are brought together and observed upon with the usual accuracy of that work. See also 8 Vin. Abr. Tit. Discovery.

of the particulars so taken, and their value. So where a man by colour of a title enters into a house, &c. and possesses himself of the goods, &c., for it may be impossible for the plaintiff to discover the particulars without such a bill. So where a will is proved, and the precedent administration revoked, such bill is usually necessary for the discovery of the goods: and yet in strictness of law there was a trespass (9).

(9) *Cage* v. *Warner*, Hard. 182

SECTION VI.

And when this court can determine the matter, it shall not be an handmaid to the other courts (*r*), nor beget a suit

(*r*) There are some cases in which, though the plaintiff might be relieved at law, a court of equity having obtained jurisdiction for the purpose of discovery, will entertain the suit for the purpose of relief; *Bishop of Winchester* v. *Knight*, 1 P. Wms. 406; *Story* v. *Lord Windsor*, 2 Atk. 630; *Worrall* v. *Marlar*, Exch. July 1786; *Lee* v. *Alston*, 1 Bro. Ch. 194. But there certainly are other cases, when, though the plaintiff be entitled to a discovery, he is not entitled to

(1) *Parker* v. *Dee*, 2 Ch. Ca. 201.

to be ended elsewhere (1). And therefore where a trial at law was pressed for, whether there was a new publication, or not, it was said, the cause must properly end here; and where the court has a jurisdiction as to the end, it must have it likewise as to the means. And if the court is fully satisfied, as to the evidence, they will not send it to a trial at law at all (*s*).

relief, *Jesus College* v. *Bloom*, 3 Atk. 262; *Sloane* v. *Heathfield*, Bunb. 18. *Piers* v. *Piers*, 1 Ves. 521; *Geach* v. *Barber*, 2 Bro. Ch. Rep. 61. To strike out the distinguishing principle upon which courts of equity in such cases have proceeded, would be indeed extremely useful, but after having given considerable attention to the subject, I find myself incapable of reconciling the various decisions upon it. It is, however, as already observed, now settled, that if the bill seek relief, a general demurrer will hold, if the plaintiff be only entitled to discovery, 2 Bro. 319. 4 Bro. 489.

(*s*) *Quære*, whether this rule applies to the case of wills of real estate obtained by fraud? See *Kenrick* v. *Bransby*, 3 Bro. P. C. 358. B. 1, c. 1, s. 3, p. 12, note. See also B. 1, c. 2, s. 3, p. 65, note.

SECTION VII.

For an issue at law is a feigned issue in an action upon the case, directed by the chancery for the better information and guiding the conscience of the court (1). And therefore no issue ought to be directed to try a matter fully proved in the cause (*t*). So where the proof of deeds is very plain, it would be dangerous to direct an issue to try the reality of them. Neither is it proper to direct an issue, whether there be a trust or not, especially where a trust appears by implication from the nature of the case. And regularly an issue ought not to be directed to try a title not alledged in the plaintiff's bill. Yet if upon the hearing, a matter not in issue does appear to the court which goes to the very right,

(1) Pre. in Ch. 223. *Richards* v. *Symes*, 2 Atk. 319.

(*t*) There are many cases in which an issue is considered as matter of right, as where the bill seeks to establish a will of real estate, the heir at law is entitled to an issue as of course; so, if the question be a purely legal question, either party may claim an issue to try it. And in *Fitton* v. *Lord Macclesfield*, 1 Vern. 293, it is said, that a decree to bind the inheritance ought not to be made on one trial only.

the court will sometimes order an issue at law to try it, and decree thereupon (2). And issues are frequently directed where matters of law are mixed with matters of fact (*u*); because the judges can explain to the jury what the law would be, if they should find the fact.

(2) *Balch* v. *Tucker*, 2 Ch. Ca. 40.

(*u*) As the court directs an issue for the better information of its conscience, it is in its discretion to grant a new trial, or even a second or third new trial; see *Matthews* v. *Warner*, 4 Ves. 206, and cases there referred to; *Pemberton* v. *Pemberton*, 11 Ves. 52.

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25, line 7 & 8, *for* 1 Nov. 1799, MS. *read* 4 Brown's C. R. 436.
35, line 17, *for* 354, *read* 444.
38, line 6, in note (*v*) *for* 1 Cox Rep. *read* 2 Cox's Rep.
56, last line, *after* case, insert 2.
75, line 3, *for* 39, *read* 60.
79, line 11, in note, *for* 620, *read* 920.
106, line 2, from bottom, for *Buddon*, read *Budder*; and in same line, *for* 13 Ves. *read* 11 Ves.
148, line 3, from bottom, *for* 255, *read* 225.
154, line 21, *for* 439, *read* 459.
155, line 20, cancel *Cowell* v. *Simpson*, 16 Ves. 278.
— line 21, *for* 256. *read* 356.
161, line 14, *for* 2945, *read* 295.
172, line 3, in marginal note, *for* 150, *read* 100.
— line 17, *after* Rep. *insert* 58.
212, line 20, *for* 19, *read* 89.
247, line 5, in marginal note (1), *for* 2 Lev. *read* 1 Lev.
277, *for* § 14, *read* § 12.
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31, line 5, of marginal note, *for* 3 Lev. *read* 2 Lev.
36, line 16, *for* 460, *read* 469.
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414, in next page, *for* 315, *read* 415.
488, in next page, *for* 984, *read* 489.

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